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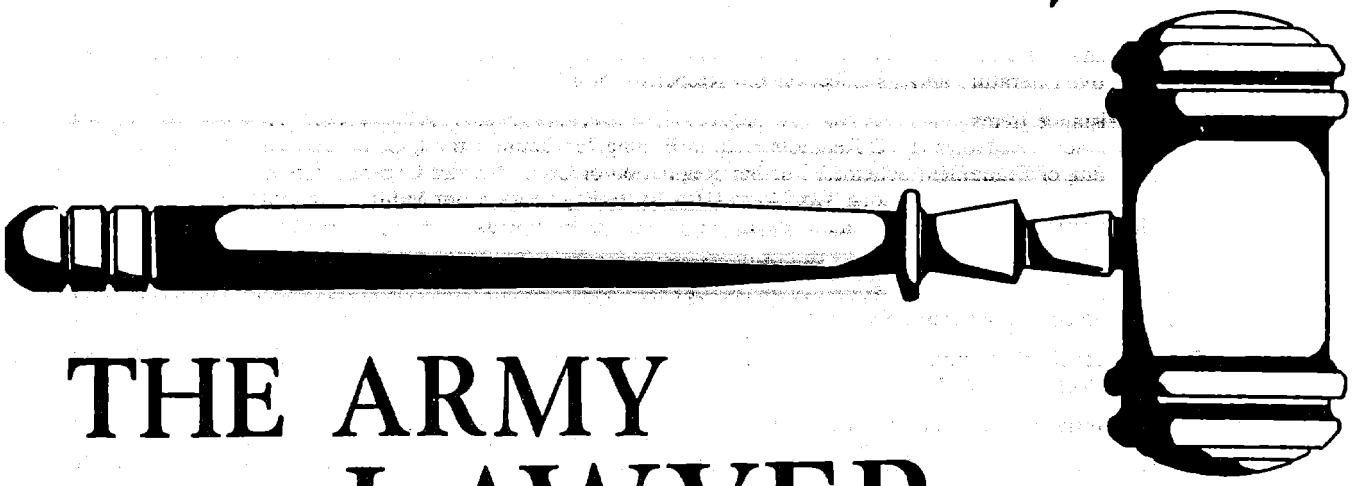

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The Bill of Rights and Service Members

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This article is intended to be a resource document for judge advocates who may encounter questions about the military justice system in light of the Supreme Court's recent decision in United States v. Solorio.[1] Solorio *overruled* O'Callahan v. Parker[2] *and its service connection test as a basis for court-martial jurisdiction. Now court-martial jurisdiction depends solely on the accused's status as a member of the armed forces.* O'Callahan *had characterized courts-martial as "not yet an independent instrument of justice" and "singularly inept in dealing with the nice subtleties of constitutional law."*[3] *This article discusses the constitutional protections provided in the military justice system and compares them to our civilian criminal system.*

Recent events have shown that at least some civilians misunderstand the military justice system. The *Washington Post,* on its editorial page of July 2, 1987, claimed that defense counsel at courts-martial are not always attorneys.[4] The dissenting Justices in *Solorio* stated that the new ruling will "sweep an entire class of Americans beyond the reach of the Bill of Rights."[5] In February 1987, former Associate Justice Arthur J. Goldberg stated that Lieutenant Colonel Oliver North and Admiral Poindexter could be compelled, without a grant of immunity, to give statements relating to arms shipments to Iran and funding the Contras.[6] He assumed this would not violate the fifth amendment. All of these statements are wrong.

These misunderstandings concern the application of the Constitution that members of the armed forces are sworn to defend. The rights given to service members in the pretrial, trial, and post-trial stages are often more protective than the rights given citizens in both the federal and state courts.

What are the sources of these rights? The first source of rights in the military is the Constitution itself, especially the Bill of Rights.[7] The most important rights for service members come from the fourth, fifth, sixth, and eighth amendments to the Constitution. In addition to the Constitution, another source of rights are federal statutes. The main statute is the Uniform Code of Military Justice,[8] which sets forth various procedural rules and the law of substantive crimes. A third source is federal case law. A fourth source of rights are executive orders, including the Manual for Courts-Martial.[9] Included within this executive order are the procedural rules,[10] rules of evidence,[11] and rules of substantive crimes of military criminal practice.[12] Another source of rights are regulations issued by the Department of Defense or by a service secretary.[13] These sources are set forth in an hierarchical scheme, the first source, the Constitution being paramount. If a lower source sets forth a more stringent provision to protect individual rights, it will prevail. Thus, for example, when the Manual for Courts-Martial, including the Military Rules of Evidence, sets forth a more stringent requirement than required by the Bill of Rights, that rule will apply to protect service members.

The debate on how the fourth amendment rules on search and seizure,[14] the fifth amendment rules on self incrimination,[15] and the sixth amendment rules on the right to counsel[16] apply to service members is often mooted by the Military Rules of Evidence. In some instances, the rights afforded service members in the Military Rules are broader than those applied to civilians in the federal courts.

Right to Privacy

Service members have a right to privacy. A military official generally must obtain a warrant before searching a soldier.[17] Warrants can be issued by military judges, magistrates, and commanders.[18] Regardless of who issues the

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[1] 107 S. Ct. 2924 (1987).

[2] 395 U.S. 258 (1969).

[3] *Id.* at 265.

[4] Wash. Post, July 2, 1987, at A20, col. 1: "Trials can take place far from the jurisdiction where the crime was committed. Defense counsel are not always attorneys."

[5] *Solorio,* 107 S. Ct. at 2941 (Marshall, J., dissenting).

[6] Goldberg, Wash. Post, Feb. 17, 1987, at A17, col. 1 (op. ed.).

[7] U.S. Const. amends. I–X.

[8] 10 U.S.C. §§ 801–940 (1982) [hereinafter UCMJ].

[9] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[10] MCM, 1984, Part II.

[11] *Id.* Part III.

[12] *Id.* Part IV.

[13] Dep't of Air Force, Reg. No. 111–1, Military Justice, Military Justice Guide (1 Aug. 1984) [hereinafter AFR 111–1]; Dep't of Army, Reg. No. 27–10, Legal Services, Military Justice (1 July 1984) [hereinafter AR 27–10]; Dep't of Navy, Manual of The Judge Advocate General (C5, May 26, 1986) [hereinafter JAGMAN]; Dep't of Transportation, Coast Guard, Military Justice Manual, COMDTINST M5810.1A (Apr. 10, 1985) [hereinafter COMDTINST].

[14] Mil. R. Evid. 311–17.

[15] Mil. R. Evid. 301–06.

[16] Mil. R. Evid. 321.

[17] *See, e.g.,* United States v. Muniz, 23 M.J. 201, 207 n.7 (C.M.A. 1987).

[18] Mil. R. Evid. 315(d)(1).

warrant, the individual must be neutral and detached,[19] understand probable cause,[20] and grant the warrant upon probable cause[21] specifically describing the place to be searched[22] and the things to be seized.[23] There are, however, exceptions to the warrant requirement. These include search incident to arrest,[24] stop and frisk,[25] inventories,[26] and inspections.[27] Both the civilian and military courts permit warrantless inspections of pervasively regulated industries and businesses. It is under this rationale that the commander has the right to inspect troops to ensure that they are properly prepared, equipped, trained, and combat ready. In conducting these inspections, it is appropriate for the commander and the delegees of the commander to inspect lockers, rooms, persons, and equipment. The exceptions listed have been recognized in the Military Rules of Evidence.

There are also many instances when there is no right to privacy, that is, no fourth amendment coverage. Most of these are not covered in the Military Rules of Evidence, and reference must be made to federal cases, both military and civilian, to determine the extent of privacy. It has been argued that military commanders and law enforcement officials should have greater leeway to conduct searches and seizures than those that are granted in the Military Rules of Evidence.[28] There is a substantial basis for this argument in a 1985 decision by the Supreme Court.[29]

The argument goes further, reasoning that the military should not apply civilian search and seizure rules because the governmental interests are different. Certainly military law should not be civilianized to the extent that it is a detriment to discipline and the maintenance of an effective fighting force. Based on this premise it has been argued that a discipline exception should be established.[30]

In at least one area the courts have applied separate standards. That is in the area of the oath. The information given to the judge or the commander need not be under oath, although an oath is preferred.

On the other hand, to ensure the right to privacy, military regulations have applied more stringent standards concerning wiretaps, including non-consensual and consensual wiretaps and the use of pen registers.[31]

Right Against Self-Incrimination

The fifth amendment also applies to service members through the Code,[32] the Manual,[33] and case law.[34] Contrary to the assertion of Associate Justice Goldberg, it would be unlawful for the President to order Lieutenant Colonel Oliver North or Admiral John Poindexter to make a statement concerning the alleged sale of arms to Iran or the funding of the Contras.[35] If Colonel North or Admiral Poindexter refused to give a statement, they could not be prosecuted for disobeying an order.[36] If Poindexter and North testified or gave a statement pursuant to such an order, it would prevent these statements from serving as a basis for criminal prosecution. The prosecution would have to establish that any evidence used to convict them was independent of the statements made pursuant to an unlawful order.[37] While there has been debate in the civilian courts and in the media concerning the wisdom of the *Miranda*[38] decision, the protection afforded a service member under the Code is broader than that afforded in the civilian community. Before an individual accused or suspected of a crime under the Code is interrogated by a person subject to the Code, the suspect must be warned of the nature of the accusation, the right to remain silent and the consequences of foregoing that right,[39] and the right to appointed counsel

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[19] *See, e.g.,* United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[20] Shadwick v. City of Tampa, 407 U.S. 345 (1972).

[21] *Id.*

[22] Dep't of Army, Pamphlet No. 27-22, Legal Services—Military Criminal Law—Evidence, para. 21-6c(1) (15 July 1987) [hereinafter DA Pam 27-22].

[23] *Id.*, para 21-6c(2).

[24] Mil. R. Evid. 314(g)(1); *see* United States v. Cordero, 11 M.J. 210 (C.M.A. 1981); United States v. Dianane, 1 M.J. 309 (C.M.A. 1976).

[25] United States v. Yandell, 13 M.J. 616 (A.F.C.M.R. 1982); United States v. Thomas, 10 M.J. 687 (A.C.M.R. 1981); United States v. Swinson, 48 C.M.R. 197 (A.F.C.M.R. 1974).

[26] *See generally* Anderson, *Inventory Searches,* 110 Mil. L. Rev. 95 (1985).

[27] Mil. R. Evid. 313(b).

[28] Wright, *How to Improve Military Search and Seizure Law,* 116 Mil. L. Rev. 157 (1987).

[29] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[30] Wright, *supra* note 28.

[31] *See* Raezer, *Needed Weapons in the Army's War on Drugs: Electronic Surveillance and Informants,* 116 Mil. L. Rev. 1 (1987).

[32] UCMJ art. 31.

[33] Mil. R. Evid. 301-07.

[34] *See, e.g.,* United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

[35] Goldberg, *supra* note 6.

[36] United States v. Heyward, 22 M.J. 35 (C.M.A. 1986) ("When compelled disclosures have an incriminating potential, the Government need for disclosure must be balanced against the individuals right against self-incrimination." When "the witness . . . is . . . an accessory or principal to the illegal activity . . . the privilege against compelled self-incrimination may excuse his non-compliance."); United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974) (a soldier is "entitled to rely on his Article 31 protection and to refuse obedience" to an order to incriminate himself); United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987) (applying *Heyward* to excuse non-compliance).

[37] Mil. R. Evid 304(a) & (b)(3) (a statement obtained in violation of the privilege against self-incrimination and any derivative evidence may not be received in evidence unless the judge finds by a preponderance of the evidence that "the evidence was not obtained by use of the statement"); *cf.* United States v. Gardner, 22 M.J. 28 (C.M.A. 1986) ("Once a defendant demonstrates that he has testified under a . . . grant of immunity . . . authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence").

[38] Miranda v. Arizona, 384 U.S. 436 (1966).

[39] UCMJ art. 31(b).

free of charge or civilian counsel at no expense to the government.[40] Any waiver of these rights must be voluntary.[41] The Supreme Court decided last Term that *Miranda* does not require civilian police to give a warning as to the nature of the offense.[42] The dissenter argued this omission deprived the individual of a knowing waiver. Additionally, *Miranda* does not apply until there is a custodial interrogation.[43] The rights warning requirements in the military, however, is triggered earlier. When an individual is suspected of an offense, the warning must be given prior to questioning, even if the suspect is not in custody.[44]

Service members are granted more rights than their civilian counterparts in the area of eyewitness identification as well.[45] In the civilian community, individuals are not entitled to lawyers at line-ups until "the initiation of the adversary judicial criminal proceeding."[46] This occurs when the suspect is faced with the prosecutorial forces of an organized society.[47] While it is unclear exactly when the right to counsel accrues, the Supreme Court has held that it accrues at the initiation of formal adversarial proceedings, which in the usual case begins with a formal charge, preliminary hearing, indictment, information, or arraignment.[48] While the Supreme Court has not set forth a specific stage when the accused is entitled to counsel, the military has. In the military, an accused or suspect is entitled to counsel when placed in a lineup after charges have been preferred,[49] or upon initiation of pretrial restraint.[50] This restraint need not be pretrial confinement; it includes restricting an individual to the barracks or placing a condition on the liberty on the individual such as putting certain places off limits.[51]

Pretrial Confinement

The Manual and Code provide that pretrial confinement should only be used as the last resort.[52] A person may only be ordered into pretrial confinement if the commander believes upon probable cause that an offense has been committed under the code, the confinee committed it, and confinement is necessary to ensure appearance at trial,[53] or, that it is foreseeable the confinee will engage in serious misconduct and less severe forms of restraint would be inadequate.[54] When an individual is placed in confinement, three reviews take place.[55] All of these must take place in a timely fashion.[56] The last review is by a military judge.[57] Unlike a civilian judge's ruling, the military judge's order releasing the individual from confinement may not be appealed.[58]

Right to Counsel

The right to counsel in the armed forces stems from the Constitution,[59] the Code,[60] and the Manual.[61] It is fair to say that the right to counsel afforded service members is far broader than that afforded most civilians because all members of the armed forces have a right to free military counsel, regardless of indigency. The right to a lawyer arises in virtually all cases in which a member's legal rights are in issue.[62] A service member has a right to counsel at

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[40] *Miranda v. Arizona.*

[41] United States v. Quintana, 5 M.J. 484 (C.M.A. 1978) ("the purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved").

[42] *Colorado v. Spring,* 107 S. Ct. 851 (1987).

[43] *Miranda,* 384 U.S. at 444.

[44] UCMJ art. 31(b).

[45] *See generally* Gilligan & Hahn, *Eyewitness Identification and Military Law,* 110 Mil. L. Rev. 1 (1985).

[46] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[47] *Id.*

[48] *Id.*

[49] Mil. R. Evid. 321(b)(A); *see also* Gilligan & Hahn *supra note* 45, at 6.

[50] Mil. R. Evid. 321(b)(A). The accused is entitled to counsel after preferral of charges or imposition of pretrial restraint under MCM, 1984, Rule for Courts-Martial 304 [hereinafter R.C.M.]. Pretrial restraint includes conditions on liberty, confinement, and restriction.

[51] R.C.M. 304.

[52] R.C.M. 305(h)(2)(B)(iii)(*b*). There is no bail provision in the military. The facts justifying bail in the civilian sector do not exist in the military because a service member continues to receive pay and allowances while in pretrial confinement. Courts-martial must take place within 90 days of confinement, absent exclusion of certain days. Moreover, the military accused does not lose his or her job.

[53] R.C.M. 305(h)(2)(b)(iii)(*a*).

[54] *Id.*

[55] The first review is by the commander. R.C.M. 305(h)(2). If the commander is the individual ordering pretrial confinement, there is no requirement for a second review by the commander. United States v. Freeman, 24 M.J. 547 (A.C.M.R. 1987). Major Finnegan first noted that it would be superfluous for the commander who ordered confinement to review his or her own order. Finnegan, *Pretrial Restraint and Pretrial Confinement,* The Army Lawyer, Mar. 1985, at 15. The second review is by a magistrate or a neutral and detached officer. R.C.M. 305(i). The third review is by the military judge. R.C.M. 305(j).

[56] The commander's review must be made within 72 hours of the report of pretrial confinement. R.C.M. 305(h)(2)(A). The magistrate's or the neutral and detached officer's review must take place within seven days of the imposition of confinement, although the reviewing officer for good cause may extend the time limit to 10 days. R.C.M. 305(i)(1)(4).

[57] R.C.M. 305(j).

[58] *Cf.* United States v. Shakur, 817 F.2d 189 (2d Cir. 1987). Under the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. III 1985), the government may appeal a release order. A similar provision does not appear in the Manual.

[59] U.S. Const. amend. VI.

[60] UCMJ art. 27.

[61] R.C.M. 503(c); R.C.M. 506; Mil. R. Evid. 305(d)2.

[62] *See* Mil. R. Evid. 305(b)2 and analysis.

interrogations[63] and, as indicated earlier, this right accrues much earlier than it does to a civilian suspect. The service member also has the earlier right to counsel at line-ups.[64] Additionally, the right to counsel in the Army accrues when the individual is placed in confinement.[65] Counsel is required to consult with the accused within seventy-two hours of confinement.[66] Additionally, the accused has the right to counsel when he or she is directed to undergo psychiatric examinations after charges have been preferred.[67]

In addition to having counsel during pretrial stages, the accused has the right to appointed counsel, individual military counsel, or civilian counsel at trial.[68] The appointed counsel, in most of the services, is independent of commanders and staff judge advocates for the installation.[69] These lawyers are members of a separate organization that is not responsible to or subject to the orders at a given post or installation.[70] If an individual is convicted at a court-martial, he or she is also entitled to free counsel on appeal, regardless of indigency.[71] The counsel on appeal is normally different than the trial defense counsel, thus serving as a check on the effectiveness of counsel.[72] In the civilian community the lawyer at trial is normally the lawyer on appeal and normally does not raise the issue of his or her effectiveness. Additionally, military appellate courts have the right to review factual findings and the sentence.[73]

While the defendant is entitled to free appointed counsel regardless of indigency at the general and special court-martial, the accused does not have the right to counsel at a summary court-martial under the Code,[74] the Manual,[75] or the sixth amendment.[76] The Supreme Court has indicated that confinement of under six months does not require a public defender in state proceedings.[77] The maximum period of confinement at a summary court-martial is one month. Therefore, constitutionally there would not be a right to a public defender in a state system.

The defendant can ensure counsel by demanding a special court-martial. Although there is no right to counsel at a summary court-martial, current practice permits representation by civilian counsel at no expense to the government. All services appear to permit, if not require, the accused to consult with defense counsel prior to determining whether to accept or reject trial by summary court-martial,[78] and Air-Force regulations provide that a lawyer will be provided free of charge at a summary court-martial.[79]

Grand Jury—Article 32 Investigation

By its express terms, the fifth amendment right to grand jury indictment is not applicable to service members.[80] This has been one of the reasons that the military system has been criticized.[81] One should question the extent of the protection provided by the grand jury, in comparison to military practice.[82] Most prosecutors will tell you that the grand jury serves as a common sense yardstick as to whether charges should be brought against an individual. When the prosecutor does not have an unanimous vote from the jurors, it would indicate some weakness in the case. And when a true bill cannot be delivered, it certainly is the ultimate test that the individual should not be prosecuted. In place of the grand jury, the military provides that an individual may not be tried by general court-martial unless there has been an Article 32 investigation or its equivalent. The Article 32 investigation performs four primary purposes. First, it protects the accused from baseless charges; second, it provides a convening authority with information on which to determine whether to refer charges to trial by

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[63] UCMJ art. 31(b).

[64] *See supra* notes 45–51 and accompanying text.

[65] *See* Mil. R. Evid. 305(d)(1)(B); 321(b)(2)(A).

[66] AR 27–10, para. 5–13*b*.

[67] United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985) (failure to grant the right to counsel under facts of this case was harmless).

[68] UCMJ art. 38(b).

[69] AR 27–10, ch. 6; AFR 111–1, paras. 3–6, 13–3.

[70] *Id.* The Navy has removed defense counsel from the post commander's chain of command. JAGMAN § 0100–0104, 041(a)–(c). In the Marine Corps, fitness reports of defense counsel are prepared by independent regional defense counsel. Marine Corps Order 58.11A (Nov. 15, 1985). The Coast Guard has also taken steps to ensure that counsel are independent. COMDTINST § 302–2.

[71] R.C.M. 1202(b).

[72] *See, e.g.,* United States v. Dupas, 14 M.J. 28, 30 (C.M.A. 1982). (the Court of Military Appeals seems to have taken the view that duties devolve upon appellate counsel without any formality); United States v. Palenius, 2 M.J. 86 (C.M.A. 1977) (duties of trial defense counsel continue until relieved of the duty by a judge or court having jurisdiction); United States v. Howard, 24 M.J. 897, 906 (C.G.C.M.R. 1987) (Baum C.J., concurring).

[73] UCMJ art. 66(c); United States v. Crider, 46 C.M.R. 108, 111 (C.M.A. 1973).

[74] UCMJ art. 16(3). The summary court-martial is a single officer court analogous to a justice of the peace. *See* UCMJ art. 20. An accused has an absolute right to refuse trial by summary court, *id.*, in which case charges will normally be referred to a higher level court.

[75] R.C.M. 1301(b).

[76] U.S. Const. amend. VI; Middendorf v. Henry, 425 U.S. 25 (1976) (The Supreme Court held that the right to counsel was inapplicable to summary courts-martial.).

[77] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[78] *See, e.g.,* AR 27–10, para. 5–21*b*. The Chief of the U.S. Army Trial Defense Service (USATDS) may permit defense counsel to represent soldiers before summary courts on a case-by-case basis. USATDS Standing Operating Procedure, para. 1–5d (1 Oct. 1985).

[79] AFR 111–1, para. 3–6d. The Court of Military Appeals has limited the use of summary court-martial convictions where the accused was not represented by counsel. United States v. Booker, 5 M.J. 238 (C.M.A. 1977).

[80] U.S. Const. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases rising in the land or naval forces, or in the Militia, when in actual service in time of War. . . ."

[81] O'Callahan v. Parker, 395 U.S. 258 (1969).

[82] *Cf.* Morganthal, N.Y. Times, June 23, 1987, at A31, col. 1. *See generally* Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant,* 51 Mil. L. Rev. 1 (1971); Sandell, *The Grand Jury and the Article 32: A Comparison,* 1 N. Ky. St. L.F. 25 (1973).

court-martial; third, it provides the convening authority with information with which to determine a specific disposition of a case; and fourth, it provides the defense with pretrial discovery of evidence that may be introduced by either side, the prosecution or the defense.[83]

Insofar as the Article 32 investigation is an inquiry into the facts surrounding the charges against the accused and thus an important pretrial screening device, it is functionally similar to both the preliminary hearing and the grand jury. It is an unique hybrid, however, and dissimilar in large part to both civilian proceedings. At its core, the Article 32 investigation is composed of an open hearing[84] at which the accused and counsel are present with the right to cross-examine adverse witnesses and to present a defense. As it also supplies the convening authority with information,[85] it has far broader scope than the normal preliminary hearing.[86] In addition, unlike the Article 32 investigation, the grand jury is a secret proceeding that deprives a testifying accused of the right to confrontation, to present evidence,[87] and generally the right to counsel before the grand jury when the accused does testify.[88] Consequently, the Article 32 investigation is far more protective than the analogous civilian proceeding.[89] It is, however, also more limited in that the recommendation of the investigating officer is advisory only and may be ignored by the convening authority. In the civilian procedure a finding by a magistrate at a preliminary hearing that there is no probable cause to hold an accused has greater legal effect[90] and refusal to indict on the part of the grand jury is final subject only to the possible indictment of the defendant by another grand jury.[91]

Discovery

In the area of discovery, unlike many civilian jurisdictions, the military criminal legal system clearly favors full discovery. As a matter of general practice, the government customarily supplies a great deal of material to the defense. In addition, both the Code and the Manual provide specific discovery rights for the defense that are far broader than those available to the civilians. Such disclosure by the prosecution includes papers accompanying the charges,[92] the names of witnesses,[93] witness statements,[94] all statements oral or written made by the accused,[95] all evidence seized from the person or property of the accused,[96] and all evidence of prior identification of the accused at a lineup or other identification procedure.[97]

Right to Speedy and Public Trial

When charges are brought, the accused has a right to a speedy trial. Trial must commence within ninety days of confinement, or within 120 days of notice of preferral of charges or imposition of some lesser pretrial restraint, whichever is earlier.[98] These rules are more stringent on the government than the rules in most jurisdictions. In addition to the right to a speedy trial, both the civilian and military accused have a right to a public trial.[99] The right to a public trial covers the entire trial, including questioning potential jurors,[100] pre-trial motions, preliminary hearings,[101] opening statements, presentation of evidence,

[83] *See, e.g.*, Hutson v. United States, 19 C.M.A. 437, 42 C.M.R. 39 (1970); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959).

[84] Although most Article 32 hearings are open to the public, there is a procedure to close them. R.C.M. 405(h)(3).

[85] Such information extends to more than a decision as to whether probable cause exists to believe the accused committed the offense. It includes consideration of nonjudicial dispositions, and the policy question of, conceding that the accused committed the offense, whether the accused should be tried or otherwise punished for it.

[86] Although grand juries serve as the "conscience" of the community and may choose not to indict individual notwithstanding sufficient evidence, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 1026 (5th ed. 1980) [hereinafter Modern Criminal Procedure], magistrates are not generally recognized as having such authority. *Id.* at 994 (citing F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 93 (1970)). Although valuable discovery *may* be obtained from some preliminary hearings, discovery is not generally recognized as a proper purpose of a preliminary hearing, *see, e.g.*, Modern Criminal Procedure, *supra*, at 966–67, 1001 n.a, and the limited nature of many examinations renders even the pragmatic opportunity to obtain discovery a limited one at best. *Id.* at 966–67.

[87] In most jurisdictions, a grand jury "target" may volunteer to give testimony.

[88] United States v. Mandujano, 425 U.S. 564, 581 (1976); Fed. R. Crim. P. 6(d). *See generally* Modern Criminal Procedure, *supra* note 86, at 782 (stating that approximately twelve states permit at least some witnesses to have counsel with them in the grand jury room). Witnesses before a grand jury may interrupt their testimony to consult with counsel outside the grand jury room. *Id.* at 783.

[89] *See generally,* Moyer, *supra* note 82, at 6–11; Sandell, *supra* note 82.

[90] Fed. R. Crim. P. 5(c). *See generally* Modern Criminal Procedure, *supra* note 86, at 975–84, 995. In some states, the government may be able to appeal a dismissal. *Id.* at 995.

[91] Some states limit resubmission. Modern Criminal Procedure, *supra* note 86, at 1027.

[92] R.C.M. 701(a)(1). This rule is different than Federal Rule of Criminal Procedure 16. These documents are usually given to the defense counsel as a package before the case is referred to trial.

[93] R.C.M. 701(a)(3). Part of this rule is based on Federal Rule of Criminal Procedure 12.1(b). The rule only seems to provide for the disclosure of witnesses to be called in the case in chief. *Cf.* Colo. R. Crim. P. 16(b)(1)(I)

[94] R.C.M. 701(a)(1)(C) requires the disclosure of "any" statement relevant to any offense charged and in possession of the prosecutor. There is no relevancy requirement under Mil. R. Evid. 401.

[95] Mil. R. Evid. 304(d)(2)(A). To be disclosed, a statement must be relevant. There is no duty to disclose the statement by the accused if its relevancy is not foreseen until after the defense case. United States v. Callara, 21 M.J. 259 (C.M.A. 1986).

[96] Mil. R. Evid. 311(d)(2)(B).

[97] Mil. R. Evid. 321(c)(2)(B).

[98] R.C.M. 707(a), (d). This rule is similar to 18 U.S.C. §§ 3161–3174 (1982).

[99] U.S. Const. amend. I.

[100] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (The Court extended the first amendment right to a public trial to the voir dire proceeding.).

[101] Waller v. Georgia, 467 U.S. 39 (1984) (The Court held it was improper to close the hearing on the motion to suppress wiretaps. The hearing was closed for seven days even though the tapes lasted only two and one-half hours.).

arguments of counsel, instruction of court members, and return of the verdict. In both communities, there is a presumption that the trial should be open.[102] The parties seeking to close the trial to the public must advance an overriding interest.[103] The presumption of an open trial is important because it is necessary to permit the public, the media, and friends of the accused and victim to determine the fairness of the hearing or trial.

Double Jeopardy

The fifth amendment protects a service member from being tried twice for the same offense.[104] The Code[105] and the Manual[106] protect a service member from being tried by a federal civilian court and then by a court-martial, or vice versa, for the same offense. None of these provisions, however, would prohibit a retrial unless the trial was terminated after the presentation of the evidence on the question of guilt or innocence.[107] In addition to the double jeopardy protection, collaterel estoppel also applies to the military. With the impetus in the military to combine all known offenses at the same trial,[108] the military prosecutor will seldom use multiple trials against a single accused. Where there are multiple trials, fairness prevents the prosecution from relitigating the same facts at a second trial.[109] The key Supreme Court case[110] on the subject applies in the military and in the federal and state courts.

Right to Trial by Military Judge

The Military Justice Act of 1968 replaced the law officer with a military judge, an attorney especially selected by The Judge Advocate General of the service based on experience and expertise in military criminal law.[111] In cases tried by general court-martial, the judge is a subordinate of The Judge Advocate General of the service, not the convening authority. In some of the armed forces this is also true of the special court-martial judge. The same act gives the service member the option of a trial by a judge or a trial with court members. The Military Justice Act of 1983 eliminated all vestiges of command control over military judges by divesting the convening authority of the authority to designate the trial judge of a particular case. Trial judges must be detailed to a court-martial by other persons who are assigned judicial duties.[112]

Since 1969, service members have had the option of requesting a bench trial with a military judge.[113]

Like many state judges, military judges do not have tenure. The military judges will typically serve for three or four years. A service member is no more entitled to a federal district court judge, who has tenure, than is any other citizen in the fifty states who was tried for a local crime.[114] The failure to have a tenured judge does not deprive the accused of due process of the law.[115]

Absence of Command Influence

Like military judges, defense counsel are now appointed by individuals assigned defense duties in the Army and Air Force. These services have separate defense counsel corps under the supervision of the service Judge Advocate General. Such organizations remove defense counsel from the command of the convening authority and further insulate them from any hint or possibility of command influence. The Navy has also created a system that separates defense counsel from the convening authority's chain of command[116] and the Coast Guard has taken steps to ensure that defense counsel are independent.[117]

Guilty Plea

Whether the accused elects to be tried by judge alone or by court members, the accused must decide whether to enter a plea of guilty or not guilty. Guilty plea practice is significantly different in the military. The Supreme Court has held that a defendant may constitutionally plead guilty while expressly maintaining innocence of the charges to which the plea is entered.[118] Military law, on the other hand, rejects this approach and requires an accused who chooses to plead guilty to expressly admit factual guilt in open court.[119] Indeed, if the trial judge's inquiry following the plea reveals even a potential defense, the judge must reject the plea and submit the case to trial. Some have argued that the military rule, which developed at a time when service members had a limited right to counsel, is not obsolete

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[102] Press-Enterprise Company v. Superior Court, 106 S. Ct. 2735 (1986) (The public's first amendment right to access to criminal proceedings applies to preliminary hearings similar to the "elaborate preliminary hearings" held in California. The closure of such a preliminary hearing for the purpose of protecting the accused's right to a fair trial is permitted only upon the demonstration that there is a substantial probability that the right to a fair trial will be prejudiced by publicity that the closure will prevent, and reasonable alternatives to closure cannot adequately protect the accused's right to a fair trial.).

[103] Waller v. Georgia, 467 U.S. at 45; Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

[104] U.S. Const. amend V.

[105] UCMJ Art. 44.

[106] R.C.M. 907(b)(2)(C).

[107] United States v. Cook, 12 M.J. 448 (C.M.A. 1982).

[108] R.C.M. 401(c) discussion.

[109] R.C.M. 905(g); Ashe v. Swenson, 397 U.S. 436 (1970).

[110] Ashe v. Swenson, 397 U.S. 436 (1970).

[111] *See, e.g.*, UCMJ art. 26(b); COMDTINST para. 303–2; Army JAGC Personnel Policies, para. 8–1 (Selection of Military Judges) (Oct 1987).

[112] R.C.M. 503(b).

[113] R.C.M. 903(a)(2). The right to elect a trial by judge alone does not apply in a capital case. R.C.M. 201(f)(1)(C).

[114] Valmar v. United States, 411 U.S. 389, 410 (1973).

[115] *Id.*

[116] JAGMAN para 0120b. *See supra* notes 69–70 and accompanying text.

[117] COMDTINST para. 32–2.

[118] North Carolina v. Alford, 400 U.S. 25 (1970). The Federal Rules of Criminal Procedure now accept the *Alford* result. Fed. R. Crim. P. 11(d), (f).

[119] R.C.M. 910(c); Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983); United States v. Logan, 47 C.M.R. 1 (C.M.A. 1973).

and should be changed. It would seem better that the military rule remain because the Supreme Court's rule casts doubt on the fairness and justice of the system.

Another difference in guilty plea cases deals with pretrial agreements. The military accused can enter into a pretrial agreement with the prosecution as to the offenses to which the accused will plead guilty and place a binding ceiling upon the sentence.[120] In most civilian jurisdictions, the prosecutor will agree to recommend a specific sentence to the judge. The judge is not bound by this recommendation. In the military, the accused has a chance to "beat the deal." The accused can decide whether to be sentenced by the judge or by court members. If the sentencing authority imposes a less severe sentence than agreed upon, the accused gets the lesser sentence. The sentence can never exceed that agreed upon.

Rules of Evidence

How do the Military Rules of Evidence compare with those in the civilian court? The military applies the Federal Rules of Evidence, with minor variations, in trials.[121] These same rules are applied in all federal trials and in civilian criminal trials in at least twenty-seven states. There are some variations that protect the accused and the victims. The rules concerning the introduction of character evidence by the accused, that is evidence to show the good character of the accused and the good reputation of the accused in the community, have been expanded to allow the introduction of more evidence in a court-martial.[122] Additionally, if there is a finding of guilty, rather than relying on a pre-sentence report, the court holds an open hearing. The rules of evidence are relaxed for the accused and the accused may require the personal attendance of various witnesses to speak about his or her background, character, potential for rehabilitation, and good military and civilian record. This is much more desirable than relying on a cold document. As to victims, the rape shield law in the military has been greatly expanded from the Federal Rule of Evidence to protect the rights of victims of all sexual offenses, not just rape.[123]

Additionally, the rules as to when the defense can require immunity be granted to defense witnesses appear to be expanded in the military courts.[124]

Verdicts

Like some state courts, the verdict of members in the military is reached on a less than unanimous verdict. The Supreme Court in *Apodaca v. Oregon,*[125] upheld felony convictions by 11–1 and 10–2 votes. The Court indicated that the sixth amendment does not require jury unanimity. The essential feature of the jury is to interpose between the accused and his accuser the common sense judgement of the group or lay persons. In upholding a 9–3 verdict in *Johnson v. Louisiana,*[126] the Court rejected the argument that unanimity is required to ensure the proof of guilt beyond a reasonable doubt. The Court noted that the reasonable doubt standard developed separately from the right to trial by jury and in any event that the lack of unanimity did not violate the reasonable doubt standard. Unanimity does not necessarily lead to a better verdict. Many have considered the trial by court members in the military to be a trial by a blue ribbon jury which ensures that the various viewpoints will be represented.[127] Another benefit of the less than unanimous verdict in the military is that it prevents a hung jury and thus saves the accused the mental distress of undergoing another trial as a result of such a hung verdict.[128] As for an offense for which the death penalty is not mandatory, the verdict in a military trial must be based upon at least two-thirds of the members present at the time of the vote. A finding of guilty of an offense for which the death penalty is mandatory requires an unanimous verdict. In computing the number of votes, any fraction of a vote is rounded up to the next whole number; for example, if there were seven members, the concurrence of at least five would be necessary to convict. While the Court has upheld less than unanimous verdicts, it has not indicated what departure from unanimity would be approved. Justice Blackmun noted in *Johnson* that a 7–5 standard rather than a 9–3 or 75% minimum would afford him great difficulty. Justice Powell, who supplied the critical fifth vote in *Apodaca,* explained his vote on the basis that unanimity was part of the jury trial right that was not incorporated by the due process clause.

With the Court having approved less than twelve member juries[129] and a less than unanimous verdict it was not long before the Court had to rule on the question of a less than unanimous verdict by less than twelve persons. In *Burch v. Louisiana,*[130] a unanimous Court struck down a misdemeanor statute that would allow punishment by more than six months confinement to be tried before a jury of six persons, five of whom must concur to render verdict. The Court noted that the lines must be drawn somewhere if the right to trial by jury is to be preserved. The Court noted that only two states allowed non-unanimous verdicts by six person juries and this fact provided a useful guide in deciding the line between those jury practices that are constitutionally permissible and those that were not.

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[120] *See* R.C.M. 705(b).

[121] Mil. R. Evid. analysis.

[122] *Compare* United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981) *with* United States v. Clemons, 16 M.J. 44 (C.M.A. 1983) *See also* Mil. R. Evid. 404 analysis.

[123] *Cf.* United States v. Saipaia, 24 M.J. 172 (C.M.A. 1987); United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983). *See also* Mil. R. Evid. 412 analysis.

[124] *Compare* United States v. Zayas, 24 M.J. 132 (C.M.A. 1987) *with* United States v. Villines, 13 M.J. 46 (C.M.A. 1982).

[125] 406 U.S. 404 (1972).

[126] 406 U.S. 356 (1972).

[127] Speech by F. Lee Bailey at Bicentennial Celebration at the Court of Military Appeals (June 9, 1987).

[128] It can be argued that the accused does not have a benefit because the government has nothing to lose in terms of time and expense in a retrial.

[129] *Apodaca,* 406 U.S. at 414 (Powell, J., concurring) (citing his concurring opinion in *Johnson,* 406 U.S. at 366).

[130] 441 U.S. 130 (1979). The rule announced in *Burch* arguably gives more protection than that afforded at a general court-martial; both the number of court members and the percentage to convict at a general court-martial may be less than what was struck down in *Burch.*

The Code provides that a general court-martial must consist of at least five members and a special court must consist of at least three members.[131] While the sixth amendment right to trial by jury does not apply to a service member, the question is whether the rationale of the Supreme Court in *Ballew v. Georgia*[132] might. In *Ballew*, the Court found that the quality of justice provided by group deliberation decreases as the size of the group is reduced to the point that the product delivered by a group of less than six is unacceptably poor. The Court in *Ballew* unanimously held that a trial by a five member jury deprived the accused of his constitutional right to a trial by jury. Historically, the argument in *Ballew* should be rejected as it might be applied to the military.[133] Military court members are selected from a more homogeneous group and are more attuned to what is necessary to have a functioning military justice system. Likewise, the military courts have been unwilling to apply the empirical data referred to in *Ballew*, as the material was compiled from juries randomly selected in civilian communities. The qualification for court members is different than selecting from a jury wheel. Additionally, there has been no showing that five-member courts would result in the conviction of an innocent individual.

Appellate Rights

Military practice affords military prisoners significant appellate rights. During the appellate process, the accused can request deferral of punishment, a formal release pending review that is similar to bail pending appeal. As mentioned earlier, the accused also has the right to a lawyer during the appellate process regardless of indigency.

Each service has an intermediate appellate court, the court of military review. The courts of military review consist of senior judge advocates appointed directly by their respective Judge Advocates General;[134] they are completely independent of the field commanders. Their scope of review is much broader than their civilian counterparts'. Unlike a civilian appellate court, the courts of military review have plenary authority to correct errors. They can review de novo factual findings and legal holdings.[135]

The court that oversees the entire military justice system, the Court of Military Appeals, is a civilian court composed of three prominent civilian jurists who have been nominated by the President and confirmed by the Senate. These individuals stand as a clear check as to any abuses that may occur.[136]

The Military Justice Act of 1983 gave a new right to military accused when it provided for Supreme Court review by writ of certiorari[137] of decisions by the Court of Military Appeals. Any case the Court of Military Appeals has agreed to consider is subject to further Supreme Court review. This would even allow appeals of summary dispositions, and in some instances, the Court of Military Appeals may grant a summary disposition to allow the service member to make an appeal. If there is an appeal to the Supreme Court, military appellate counsel are appointed for the service member free of charge.[138]

Conclusion

There are a number of messages in this article. First there is an attempt to portray the unfounded misunderstandings held by many in the civilian community. Service members do enjoy broad rights. Sometimes they are broader than constitutionally required. While recognizing that discipline in the service is essential, Congress and the President have tried to protect the service member against unbridled discretion by a commander. It is for these reasons that broader rights are given to the service member. Second, one might ask whether the service member needs to have broader rights that constitutionally required when we consider the nature and purpose of the armed forces. At least, these broad rights should be touted in the civilian community. The services should be proud of these constitutional rights and members of these services should speak about these rights to our civilian counterparts. It is because service members have not talked about the extent of these extensive rights that there have been mis-statements from well intentioned people: the media, former Justices, and even present Justices of the Supreme Court. A combat fighting force does have broad constitutional rights.

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[131] UCMJ art. 16.

[132] 435 U.S. 223 (1978).

[133] *Cf.* United States v. Wolff, 5 M.J. 923 (N.C.M.R. 1978). See Appendix A as to jury size and unanimity chart as of 1987. This appendix was prepared by Michele Lewane while working as an intern for the Criminal Law Division at The Judge Advocate General's School.

[134] UCMJ art. 66(a).

[135] UCMJ art. 66(c).

[136] These judges are not tenured because the Court of Military Appeals in an article I rather than an article III court.

[137] UCMJ art. 67(h); *see also* R.C.M. 1205.

[138] R.C.M. 1202(b)(2).

Appendix A

Jury Size and Unanimity Chart in Criminal Actions—1987

State	*Jury Size*	*Verdict*
Alabama	12	unanimous
Alaska	no more than 12 & no less than 6	"
Arizona	capital—12 all others—no less than 6	"
Arkansas	12 or less if parties stipulate	"
California	felony—12 nonfelony—12 or less if parties stipulate	"
Colorado	6 or less if parties stipulate but no less than 3 petty offenses—3 or more if demand but no more than 6	"
Connecticut	capital—12 otherwise—6	"
Delaware	12	"
Florida	capital—12 otherwise—6	"
Georgia	superior court—12 state court—6 unless demand 12	"
Hawaii	12 or less if parties stipulate	"
Idaho	felony—12 misdemeanor (1 yr or less)—6	"
Illinois	12 or less if parties stipulate	"
Indiana	Class A, B & C felonies—12 or less if parties stipulate all others—6	"
Iowa	12	"
Kansas	felony—12 misdemeanor—6	"
Kentucky	felony—12 misdemeanor—6	"
Louisiana	capital—12 necessary confinement offense—12 possibility of confinement offense—6	capital—unanimous necessary confinement offense—10–2 possibility of confinement offense—unanimous
Maine	12	unanimous
Maryland	12 or less if parties stipulate	"
Massachusetts	superior court—12 district court—6	"
Michigan	felony—12 misdemeanor—6	"
Minnesota	gross misdemeanor & felony—12 misdemeanor—6 petty—no jury	unanimous
Mississippi	12	"
Missouri	12 or less if parties stipulate but no less than 6	"
Montana	district court—12 justice of peace court—6	"
Nebraska	12 or less if parties stipulate	"
Nevada	12 or less if parties stipulate but no less than 6	"
New Hampshire	12	"
New Jersey	12	"
New Mexico	misdemeanor—6	"
New York	12	"
North Carolina	12	"
North Dakota	12	"
Ohio	misdemeanor—8	"
Oklahoma	12 misdemeanor—6	"
Oregon	felony—12 misdemeanor—6	murder & misdemeanors—unanimous all other felonies—10–2
Pennsylvania	12	unanimous
Rhode Island	12	"
South Carolina	12 magistrate ($200 or less)—6	"
South Dakota	12 or less if parties stipulate	unanimous or less if parties stipulate
Tennessee	12	unanimous
Texas	district courts—12 county courts—6	felonies—unanimous nonfelonies—9–3
Utah	capital—12 all others—8	unanimous
Vermont	12	"
Virginia	felony—12 misdemeanor—7	"
Washington	12	"
West Virginia	circuit court—12 magistrate—6	"
Wisconsin	12 or less if parties stipulate	"
Wyoming	felony—12 misdemeanor—less than 12 but no less than 6	"
ABA Standard	parties may stipulate to less than 12	parties may stipulate to less than unanimous

The Assimilative Crimes Act Revisited: What's Hot, What's Not

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Introduction

It may surprise those unfamiliar with the workings of our federal reservations to learn that much of the criminal law enforced on them comes from the state in which they lie. This situation arises due to the operation of the Federal Assimilative Crimes Act (ACA or Act).[1] In areas under exclusive or concurrent federal legislative jurisdiction, the ACA adopts, as federal law, the crimes and corresponding punishments of the state surrounding a particular enclave, and applies them to supplement the federal criminal code.[2] The "law," as applied on federal lands, thus varies between an Army post in North Carolina, for example, and a Navy submarine base in the State of Washington.

Although many facets of the operation of the ACA are well-settled, the application of such a general law to such varying locations leaves plenty of room for debate and argument over specific cases. This article briefly covers the history of the Act and its general operation. It then discusses which state laws are, and which are not, assimilated and some special issues surrounding punishment. The purposes of the article is to give an overview of the ACA, discussing both settled and unsettled areas of the law, thereby providing the reader with a basic understanding of the Act as it is currently applied.

The Assimilative Crimes Act Generally

A Historical Overview

As the United States developed in the early 1800s, it became obvious that a problem existed as to the enforcement of criminal laws on federal lands. The criminal code enacted by Congress contained only a few substantive crimes, and did not cover the great bulk of common offenses.[3] Because the states lacked jurisdiction over land ceded to the federal government, "[r]apes, arsons, batteries, and a host of other crimes [could in those] places be . . . committed with impunity."[4] In 1825, Congress passed a bill,[5] sponsored by Daniel Webster,[6] remedying the situation. That law was the original version of what has become known as the ACA.[7]

Except for minor changes in phrasing, the ACA has not changed much since 1825. In its original form, it incorporated only the state laws in force on the day it was enacted, causing it to be reenacted on an irregular basis to "catch up" with changes in state law.[8] This deficiency was remedied in 1948[9] and the Act currently assimilates the state law in force on the date an alleged offense occurred.[10] Congress has made no changes to the ACA since 1948.

The Operation of the ACA

The ACA only operates when "any enactment of Congress" has not already made certain conduct criminal.[11] Therefore, where Congress has not legislated, it "is a shorthand method of providing a set of criminal laws on federal reservations by using local law to fill the gaps in federal criminal law."[12] This is especially convenient for sundry offenses of a minor nature[13] and saves the federal government from being forced to enact laws for geographically scattered reservations to cover all aspects of criminal behavior. Additionally, because the size of a federal enclave[14] may be quite small, the Act precludes the

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[1] 18 U.S.C. § 13 (1982). The Act reads as follows:
> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

[2] United States v. Williams, 327 U.S. 711, 718 (1946). *See generally* Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685 (1957).

[3] Act of 30 April, 1790, 1 Stat. 112.

[4] United States v. Press Publishing Co., 219 U.S.1, 12 (citing 1 J. Story, Life of Justice Story 293 (Boston 1851)).

[5] Act of 3 March, 1825, 4 Stat. 115. In addition to expanding the list of enumerated federal crimes, section 3 of the Act read:
> [I]f any offence shall be committed [in an area ceded to, and under the jurisdiction of, the United States], the punishment of which offence is not specially provided for by any law of the United States, such offence shall upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, [on] navy-yard . . . is situated, provide for the like offence when committed within the body of any county of such state.

[6] *Williams*, 327 U.S. at 721.

[7] *Id.*

[8] United States v. Sharpnack, 355 U.S. 286, 291 (1957).

[9] Act of June 25, 1948, Pub. L. No. 80–772, § 13, 62 Stat. 683, 686.

[10] *Sharpnack*, 355 U.S. at 292. *Sharpnack* upheld this change to the ACA against a challenge that it was an unconstitutional delegation by Congress of its legislative authority. *Id.* at 297.

[11] 18 U.S.C. § 13 (1982); *see infra* text accompanying notes 45–48.

[12] United States v. Prejean, 494 F.2d 495, 496 (5th Cir. 1974).

[13] In 1982, over 70,000 petty offenses committed on military installations were prosecuted in front of United States magistrates. S. Rep. No. 174, 98th Cong., 1st Sess. 232, *reprinted in* 1983 U.S. Code Cong. & Admin. News 1081, 1122.

[14] The Act applies in areas of exclusive or concurrent federal jurisdiction. These areas vary greatly in size and use. *See infra* note 34.

somewhat ludicrous situation in which a criminal code might need to be developed for a single building.[15]

One effect of the Act is that it generally conforms the criminal laws on federal lands to those of the state outside. This has been viewed as beneficial because it results in minimal interference with the authority of the states over the punishment of crimes within their borders.[16] This "similarity" of laws, especially as applied to offenses that are malum prohibitum, such as routine traffic violations, also benefits the individual citizen by providing common standards and eliminating confusion over the substance of the law.

The Act only assimilates the criminal law of the jurisdiction in which the federal enclave exists because it is, itself, a penal statute.[17] Most criminal statutes are easily distinguishable from their civil or regulatory cousins, but sometimes the distinction is not so clear.[18] In discussing this aspect of the ACA, it is appropriate to mention the general methods by which the federal courts interpret state law for ACA purposes.

"Prosecutions under [the ACA] 'are not to enforce the laws of the state . . . but to enforce the federal law, the details of which, instead of being recited, are adopted by reference.' "[19] Federal courts construe the adopted state law as a federal criminal statute, and are thus not bound by the rulings of state courts interpreting those same laws.[20] Nevertheless, while maintaining their independence, the federal courts clearly look closely at, and pay deference to, the state's interpretation of its own laws.[21]

This deference can be seen in the interpretations made by federal courts in determining whether a state law is criminal or civil. Where a state court determines that a statute is civil, the federal court has little or no discretion to decide otherwise.[22] In *United States v. Hollingshead,*[23] the government attempted to prosecute the defendants under the ACA for failing to submit to a blood-alcohol test under Hawaii's implied consent law. The court found that the Hawaii Supreme Court had determined that the implied consent law was civil in nature and dismissed for lack of jurisdiction.[24] Nevertheless, where a state has determined its statute to be penal, the federal court will make an independent assessment that will include a careful look at how the state has applied and construed the law.[25]

Punishment

A person guilty of an offense under the ACA will be "subject to a like punishment" as that provided by the state for the same crime. Therefore, the length of the prison term set by the state controls the sentence imposed by federal courts under the Act.[26] A federal court cannot look to other provisions of federal law to increase the punishment set by the state.[27] Additionally, the types of punishment allowed are set by the state; for example, a federal court cannot adjudge confinement *and* a fine, when the state punishment calls for confinement *or* a fine.[28]

Selective Incorporation

Federal authorities may not "selectively assimilate" only certain of a state's criminal laws.[29] Except for those laws incapable of, or not susceptible to adoption for recognized reasons,[30] the entire state criminal law is assimilated onto the federal reservation. In *United States v. Robinson,*[31] the Administrator of the FAA attempted to adopt the Virginia laws on disorderly conduct, gambling, obscene literature, and drunkeness for use at Washington National and Dulles

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[15] *See* United States v. Andem, 158 F. 996 (D.N.J. 1908) (forgery in post office building over which United States had obtained exclusive legislative jurisdiction by cession).

[16] United States v. Press Publishing Co., 219 U.S. 1, 9 (1911).

[17] United States v. Best, 573 F.2d 1095, 1098 (9th Cir. 1978). Further, "only state-wide criminal statutes, not local or municipal laws, are incorporated." Sylvane v. Whelan, 506 F. Supp. 1355, 1356 n.1 (E.D.N.Y. 1981).

[18] *See* Kay v. United States, 255 F.2d 476, 480 (4th Cir.), *cert. denied,* 358 U.S. 825 (1958) (that portion of Virginia statute creating a presumption of intoxication if there was more than 0.15% by weight of alcohol in the blood was part of the substantive offense.)

[19] McCoy v. Pescor, 145 F.2d 260, 262 (8th Cir.), *cert. denied,* 324 U.S. 868 (1944) (quoting Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937).

[20] Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 391 (1944).

[21] *See e.g.,* United States v. Williams, 327 U.S 711 (1946); United States v. Sain, 795 F.2d 888 (10th Cir. 1986); Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981 (1966); United States v. Rowe, 13 C.M.A. 302, 32 C.M.R. 302 (1962).

[22] United States v. Hollingshead, 616 F. Supp. 160, 161 (D.C. Haw. 1985).

[23] *Id.*

[24] *Id.* at 162; *see also* United States v. Rowe, 559 F.2d 1319, 1320 (4th Cir. 1979) (defendant could not be prosecuted under ACA for refusal to submit to breathalyzer when Supreme Court of Virginia had held that a proceeding to suspend a driver's license for refusal to take a blood test was administrative and civil in nature).

[25] *See* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 389–90 (1944). The determination of which state laws are criminal has other ramifications for the federal government because declaring a state regulatory scheme "penal" would allow it to operate on federal installations. *Id.* at 389 n.8. "[A] state could thereby enforce its regulatory system on the federal jurisdiction making criminal any failure to comply with those regulations (*i.e,* licenses, permits, etc.)." United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977).

[26] United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985); United States v. Vaughan, 682 F.2d 290, 294 (2nd Cir.), *cert. denied,* 459 U.S. 946 (1982); United States v. Smith, 574 F.2d 988, 992 (9th Cir.), *cert. denied sub nom.* Williams v. United States, 439 U.S. 852 (1978). Federal prosecutors frequently look to the ACA in search of higher penalties under state law. For an example of such an attempt, see United States v. Irvin, 21 M.J. 184, 189 (C.M.A. 1986) ("Perhaps the penalties authorized by the President for assaults on children are too lenient; but if this is true, the situation must be corrected by a Manual change, rather than by invoking state law pursuant to the [ACA].")

[27] *See* United States v. Dunn, 545 F.2d 1281 (10th Cir. 1976).

[28] United States v. Sosseur, 181 F.2d 873, 876 (7th Cir. 1950). For additional discussion of what constitutes "punishment" under the ACA and other sentencing issues, see *infra* text accompanying notes 123–52.

[29] United States v. Robinson, 495 F.2d 30, 33 (4th Cir. 1974).

[30] *See infra* text accompanying notes 45–122.

[31] 495 F.2d 30 (4th Cir. 1974).

Airports, while enacting separate regulatory penalties in lieu of the State's punishments for those offenses. The court was not certain what the Administrator's theory had been, but it rejected his attempts as improper under the ACA.[32]

Jurisdiction Under the ACA

Legislative Jurisdiction

The ACA states that it is applicable in the "places now existing or hereafter reserved or acquired as provided in section 7 of this title." Section 7 defines the entire special maritime and territorial jurisdiction of the United States;[33] the ACA is, however, only applicable on those lands defined in section 7(3),[34] that is, those areas under the "exclusive or concurrent jurisdiction" of the United States.[35]

The terms "exclusive or concurrent jurisdiction" refer to legislative jurisdiction: the authority to legislate within a geographically defined area.[36] Exclusive jurisdiction vests the federal government with all authority to legislate, with minor powers such as the authority to serve civil and criminal process reserved to the state.[37] Under concurrent jurisdiction, both sovereigns retain the right to legislate, giving the United States the advantages of state enforcement while reserving to it the power to prosecute whenever the state fails to do so.[38]

Proof of Legislative Jurisdiction

Proof of one or the other of these types of jurisdiction is required for any prosecution under the ACA. Many courts are willing to take judicial notice[39] of, or acknowledge the existence of, territorial jurisdiction without extensive analysis,[40] while some have expended great effort in ensuring its existence.[41] Others have seemingly confused the concepts of ownership and territorial jurisdiction[42] or ignored the requirement for proof altogether, resulting in reversal on appeal.[43]

The perils of a casual approach to proof of legislative jurisdiction are increased by the fact that federal reservations on land under exclusive or concurrent jurisdiction frequently contain substantial areas under some other form of jurisdiction.[44] This places in issue the jurisdictional status of the specific piece of ground upon which the offense is alleged to have occurred. Whatever the jurisdictional status of the land involved, that status should be, at a minimum, judicially noticed and, when necessary, established by evidence presented on the merits.

What State Laws Are Not Assimilated

As a general rule, the ACA operates to assimilate the entire criminal law of a state on to a federal enclave within it. The following sections highlight the major exceptions to this rule.

The Exception Within the Act—If Punishable By Any Enactment of Congress, ACA Does Not Apply

"Enactments of Congress" Generally. The ACA provides that it does not apply where the alleged act or omission is "made punishable by any enactment of Congress." Although "enactments" cited as blocking assimilation are usually crimes within the federal criminal code,[45] punitive regulations issued by federal agencies have also been held to

[32] *Id.* at 33. It would seem that the Administrator was wrong on two counts. First, he tried to assimilate only four laws, and second, he attempted to assimilate them without bringing along their punishments.

[33] 18 U.S.C. § 7 (1982) reads in part as follows:
The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes . . . (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

[34] Note, *supra* note 2, at 686 ("only the areas defined in section 7(3) are likely to be 'places' situated within the borders of a state, territory, possession, or district" as listed in the ACA). "The areas within section 7(3) are extensive, and include public lands, Indian reservations, land used for forts and military reservations, locks and dams, post offices, national parks, housing projects, navy yards, and airports." *Id.* (footnotes omitted). The section was even held applicable to the grounds of a U.S. Embassy in Africa for purposes of a prosecution under the federal manslaughter statute. United States v. Erdos, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973).

[35] *See generally* Forth Leavenworth R.R. v. Lowe, 114 U.S. 525, 532–34 (1885) (discussing methods of obtaining, and types of, federal legislative jurisdiction).

[36] *See* U.S. Const. art. 1, § 8 cl. 17. *See generally* Dep't of Army, Pamphlet No. 27–21, Legal Services—Military Administrative Law, para. 2–5 (1 Oct. 1985) (discussing legislative jurisdiction).

[37] Fort Leavenworth R.R. v. Lowe, 114 U.S. at 532–33.

[38] Note, *supra* note 2, at 687 n.26; *see also* United States v. Dreos, 156 F. Supp. 200, 206–07 (D. Md. 1957) (United States has concurrent jurisdiction over portion of Baltimore-Washington Parkway and ACA applies).

[39] *See* Fed. R. Evid. 201.

[40] *See e.g.*, United States v. MacDonald, 456 U.S.1, 5 n.4 (1982) ("The District Court had jurisdiction because the crimes were committed on military property."); United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979); United States v. Hughes, 542 F.2d 246, 248 n.1 (5th Cir. 1976).

[41] *See* United States v. Watson, 80 F. Supp. 649 (D. Va. 1948) (criminal jurisdiction over a road through Marine Corps Base, Quantico, Virginia held by United States, but not "ownership" for trespass purposes due to easement to give public access to the civilian town of Quantico, located entirely within the confines of Marine base).

[42] *See* United States v. Blunt, 558 F.2d 1245 (6th Cir. 1977).

[43] *See* United States v. Irvin, 21 M.J. 184 (C.M.A. 1986) (government failed to prove territorial jurisdiction at trial level and appellate court unable, on facts in record, to take judicial notice).

[44] "[A]bout 157,588.023 acres of the Fort Hood Military Reservation—less a few excepted areas—have been subject to the exclusive jurisdiction of the United States since October 30, 1950; but 49,578.72 other acres have never been subject to any Federal jurisdiction." United States v. Williams, 17 M.J. 207, 214 (C.M.A. 1984).

[45] 18 U.S.C. §§ 1–2520 (1982 & Supp. III 1985).

block assimilation.[46] Additionally, the punitive articles of the Uniform Code of Military Justice[47] will prevent the assimilation of similar state crimes in courts-martial.[48]

The question of whether an act has already been "made punishable" under federal law is sometimes patently obvious. In *United States v. Baker*,[49] the federal crime prohibiting "conduct . . . which otherwise impedes or disrupts the performance of official duties by Government employees" blocked assimilation of a state law proscribing "knowingly hindering a public servant in the discharge of his official duties."[50] The court in *Dunaway v. United States*[51] upheld an ACA conviction based on a state burglary statute, while reversing the defendant's larceny conviction, which was based on an assimilated state larceny statute virtually identical to that contained in the federal code.[52] The answer to the question of whether certain conduct has been "made punishable" can be elusive, however.

The *Williams* Case. In 1946, the Supreme Court dealt with this issue in *United States v. Williams*.[53] Williams, a married white man, was convicted pursuant to the ACA of committing "statutory rape" under Arizona law upon an Indian girl who was over sixteen but under eighteen years of age.[54] The Arizona law made consensual intercourse with a female under eighteen a crime.[55] The federal "carnal knowledge" statute was similar in all respects, but set the age of consent for the female at sixteen, thus precluding the prosecution of the defendant under it.[56] Williams contended that the federal carnal knowledge statute blocked assimilation of the Arizona statutory rape law and the Supreme Court agreed with him, reversing his conviction.[57]

The Court based its holding on two grounds:

> (1) The precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition.[58]

That the second of these rationales was the actual basis of the decision is clear from a study of the remainder of the opinion.[59] After noting that the specific acts of the defendant were punishable under federal adultery and fornication laws,[60] the Court shifted its focus to the purpose of the ACA: to "use local statutes to fill in the gaps in the Federal

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[46] United States v. Baker, 603 F.2d 104, 105 (9th Cir. 1979) (Veteran's Administration regulation).

[47] Uniform Code of Military Justice arts. 77–134, 10 U.S.C. §§ 877–934 (1982 & Supp. III 1985) [hereinafter UCMJ].

[48] *See e.g.*, United States v. Irvin, 21 M.J. 184 (C.M.A. 1986); United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Picotte, 12 C.M.A. 196, 30 C.M.R. 196 (1961). UCMJ art. 134(3) authorizes the court-martial of service members for "crimes and offenses not capital." This includes all noncapital federal offenses, including those made "federal" by operation of the ACA. Under the doctrine of preemption, however, UCMJ art. 134 may not be applied to conduct enumerated in the punitive articles of the UCMJ. United States v. Norris, 2 C.M.A. 236, 8 C.M.R. 36 (1953). The principles under which the preemption doctrine is applied to charges under UCMJ art. 134 and those applying the "any enactment of Congress" language of the ACA are markedly similar. In fact, the military courts often mix them together and talk of both within the same case. *See Picotte*, 12 C.M.A. at 198–200, 30 C.M.R. at 198–200; *Wright*, 5 M.J. at 110–11. While this practice causes no actual harm, it is suggested that because the preemption issue is based solely on military law, the military courts address it first when assessing the applicability of an assimilated offense to a court-martial. Only if the crime were not preempted under the military law would the court be forced to enter into the "any enactments of Congress" analysis to determine if its assimilation was blocked (by the same enumerated articles that had failed to cause its preemption). The preemption doctrine does not apply to Article 134(1) and (2) offenses. Manual for Courts-Martial, United States, 1984, Part IV, para. 60c(4)(c)(ii) and para. 60c(5). Nevertheless, legal specialists in the area do believe that the existence of a corresponding Article 134(1) or (2) offense should block assimilation of the state crime. Major Thomas Mason, Instructor, TJAGSA, makes the point that the "key" language in an Article 134(1) or (2) specification is the "prejudicial to good order/service discrediting" language and not the other listed elements. This might lead to a conclusion that the presence of these offenses in the Manual for Courts-Martial does not block assimilation. Major Mason, however, suggests that the spirit of the doctrine of preemption, as set out in *Picotte* and United States v. Rowe, 13 C.M.A. 302, 32 C.M.R. 302 (1962), covers the listed Article 134(1) and (2) offenses. Major Michael Hockley, USAR, a former TJAGSA instructor, suggests that the listed Article 134(1) and (2) offenses are the equivalent of federal regulations, which would block assimilation of state law. *See infra* notes 107–09 and accompanying text. The punitive articles are "enactments of Congress" in court-martial prosecution's involving ACA issues; however, they are not "enactments of Congress" in other federal Courts. *See infra* notes 94–102 and accompanying text.

[49] 603 F.2d 104 (9th Cir. 1979).

[50] *Id.* at 105 (rejecting prosecution argument that the scienter required by state statute distinguished the two laws).

[51] 170 F.2d 11 (10th Cir. 1948).

[52] *Id.* at 12; *accord* United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979). It is probably not coincidental that in both *Dunaway* and *Lavender*, the punishment for larceny under state law was greater than that under federal law. The defense bar also attempts to stretch the ACA to fit its facts. *See* United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (rejecting defense argument that federal labeling laws, intended to apply to fireworks manufacturers, prohibited the defendant's conduct of possession of illegal fireworks, thus precluding assimilation).

[53] 327 U.S. 711 (1946).

[54] *Id.* at 713.

[55] *Id.* at 716 n.11.

[56] *Id.* at 715.

[57] *Id.* at 725.

[58] *Id.* at 717–18 (citations omitted).

[59] Outside of the "precise acts" language in the holding, the Court mentioned "specific acts" twice, each time as an adjunct to a statement to the effect that Congress had already legislated as to the crime of statutory rape by the enactment of the carnal knowledge statute. Any assertion that Congress had intended to cover the actions of the defendant via the adultery statute cannot withstand analysis. This is true because it was a mere fortuity that Williams was a *married* man. Fornication is not mentioned in the holding, but is mentioned once in the opinion. However, the fact that Congress called what the defendant did "fornication" merely shows the *result* of their focus on the "generic" act of statutory rape, and their ultimate definition of it. Because the bulk of the opinion is devoted to congressional intent as to carnal knowledge, it is suggested that the inclusion of the "precise acts" language in the opinion was at best only meant to highlight the true intent of Congress and at worst was an attempt to cover all possible reasons for overturning the conviction of a lower court.

[60] *Id.* at 718.

Criminal Code where no action of Congress has been taken to define the missing offense."[61] The ACA operated to supplement, but not to modify or repeal, existing provisions of the federal law.[62]

The Court felt that the determination of whether an act was punishable by "any enactment of Congress" depended upon whether Congress had prohibited the "generic acts" that formed the basis of the state crime.[63] To answer that question on the facts of the *Williams* case, the Court examined the legislative history and found "an increasing purpose by Congress to cover rape and all related offenses fully with penal legislation."[64] Congress had "covered the field with uniform legislation."[65] Most critically, when enacting the carnal knowledge statute in 1889, Congress had given special attention to the age of consent, and had fixed it at sixteen.[66] Thus, Congress had already enacted a "statutory rape" law for federal use, and it prevented assimilation of the Arizona statute.

Recent Applications of *Williams*: The Great Debate Over "Generic" versus "Precise" Acts. Since *Williams* was decided, the courts have not always agreed on what it held. Because the holding purported to advance two bases for rejecting the assimilation of the Arizona statute, the cases have varied in the reliance they place on one or the other as applied to a particular set of facts. The following sections discuss several recent opinions from the circuit courts of appeals and propose a methodology for determining whether an "enactment of Congress" has made certain conduct punishable.

Must the "Precise Act" be Punishable to Block Assimilation? The leading proponent of the view that prosecution under the ACA may always proceed unless the "precise acts" are punishable under federal law is the Fifth Circuit.[67] In *United States v. Brown*,[68] the defendant was convicted under the ACA of the Texas offense of "having recklessly or with criminal negligence engaged in conduct causing serious bodily injury to [a] child."[69] The defense argues that because the conduct was punishable under the federal criminal assault provisions of 18 U.S.C. § 113,[70] the state statute could not be assimilated. The court affirmed the conviction, stating that "[a]lthough the acts with which the defendant was charged could be punishable under the federal assault statute, the 'precise act' of injury to a child is not proscribed by federal law."[71]

Recently, in *United States v. Fesler*,[72] the Fifth Circuit reaffirmed its adherence to the "precise acts" standard.[73] The defendants had deliberately scalded their infant daughter, resulting in her eventual death and their conviction for involuntary manslaughter under federal law and "child abuse" under Texas law as assimilated by the ACA.[74] The court compared the elements of the two offenses and found that the federal offense did not require the victim to be under fourteen years of age, as did Texas's "child abuse" law. Conversely, the state offense did not require the death of the victim, as did federal involuntary manslaughter.[75] The court concluded that "[b]ecause Congress did not cover the precise acts of child abuse covered by Texas State law, the ACA was properly invoked and applied."[76]

The "precise acts" standard, as applied by the Fifth Circuit in *Fesler*, amounts to a *Blockburger*[77] "multiplicity" analysis.[78] *Blockburger*, a 1932 Supreme Court decision, held that the test of identity of offenses is whether each separate offense requires proof of an additional fact which the other does not.[79] Irrespective of the result reached, this "precise acts" methodology does not comport with

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[61] *Id.* at 719.

[62] *Id.* at 718.

[63] *Id.* at 722–23.

[64] *Id.* at 724.

[65] *Id.*

[66] *Id.* at 725 "[T]he age was fixed by the committee after considerable discussion and examination of the laws of the several States. Some of the States have changed their laws. A number of States have fixed the age at sixteen. Some of them have fixed as high as eighteen." *Id.* at 725 n.29 (quoting Senator Faulkner, 19 Cong. Rec. 6501).

[67] *See* United States v. Fesler, 781 F.2d 384 (5th Cir.) *cert. denied*, 106 S. Ct. 1977 (1986); United States v. Brown, 608 F.2d 551 (5th Cir. 1979).

[68] 608 F.2d 551 (5th Cir. 1979).

[69] *Id.* at 553.

[70] 18 U.S.C. § 113 (1982) covers: (a) Assault with intent to commit murder or rape; (b) Assault with intent to commit any felony except murder or rape; (c) Assault with a dangerous weapon; (d) Assault by striking, beating, or wounding; (e) Simple assault; and (f) Assault resulting in serious bodily injury. Subsection (f) was added to this section in 1976. 18 U.S.C. § 113 (1976) revisor's note. The *Brown* court apparently overlooked this amendment. *See* 608 F.2d at 553 n.3 (listing § 113(a)–(e), but omitting (f)). Because the decision stressed "causing injury to a child" and not "causing serious bodily injury" as the "precise act" at issue, the apparent failure to consider the effect of subsection (f) may not have been material to the final result.

[71] 608 F.2d at 554 (citation omitted).

[72] 781 F.2d 384 (5th Cir.), *cert. denied*, 106 S. Ct. 1977 (1986).

[73] "[T]his court has held that the 'precise act' made penal under federal [sic] law must be penal under state [sic] law before prosecution under the ACA is barred." *Id.* at 390 (citing *Brown*, 608 F.2d at 554).

[74] 781 F.2d at 388

[75] *Id.* at 391.

[76] *Id.*

[77] *See* Blockburger v. United States, 284 U.S. 299 (1932).

[78] This conclusion is strengthened by the citation to *Fesler* in United States v. Webb, 796 F.2d 60, 63 (5th Cir. 1986). The defendant in *Webb* argued that his sentences for murder (in violation of 18 U.S.C. § 1111 (1982)) and injury to a child (under the same Texas statute used in *Fesler*) violated the double jeopardy clause of the fifth amendment. In conducting its analysis under *Blockburger*, the court cited *Fesler* as dispositive of the issue and ruled that the *Blockburger* test was satisfied. *Id.*

[79] 284 U.S. at 304.

Williams.[80] First, *Blockburger* was decided fourteen years prior to *Williams*; if the Supreme Court had intended to apply a *Blockburger* approach in *Williams,* it would have said and done so. Second, and more importantly, the analysis in *Williams,* did not hinge on the "precise acts" involved. Its thrust was instead directed at the fact that Congress defined the offense of carnal knowledge for the federal law and that its definition was not be expanded by the assimilation of state law.[81]

The "Generic" Acts Approach. Some courts have interpreted *Williams* as being "primarily concerned not with whether the *precise acts* [have] been made penal, but with the discernment of the intent of Congress to punish the *generic* conduct in question."[82] Typical of this approach is the Eighth Circuit's opinion in *United States v. Butler.*[83]

Butler had been convicted pursuant to the ACA of a South Dakota law prohibiting the possession of a firearm by a felon.[84] The court reversed his conviction because it felt that the generic conduct of acquisition and receipt of firearms by felons was already punishable under federal law.[85] The court recognized that conviction under the federal law required the additional proof of an interstate nexus and venue.[86] Nevertheless, it ruled that the test was not whether the "exact same elements of proof are required under the state and federal laws."[87]

Using a generic conduct analysis, the Ninth Circuit, in *United States v. Smith,*[88] considered whether the federal rape statute blocked assimilation of a state sodomy statute under which several male prisoners were convicted of forcibly sodomizing another male prisoner. The court affirmed the convictions, noting that the federal rape statute punished rape as defined at common law; "that is, carnal knowledge of a female by force or threat of force."[89] It concluded that the "enactment of the federal rape statute does not constitute legislative action with reference to acts of sodomy."[90]

A Suggested Methodology. It is, of course, incorrect to suggest that courts addressing the *Williams* issue always follow either a "precise act" or a "generic conduct" approach. Some courts cite *Williams,* discuss the "precise" and "generic" approaches, and end up using neither.[91] Other courts enter into a *Williams* analysis when it is not

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[80] Even the *Fesler* court acknowledged that "[i]t is important that the state statute seeks to punish a particular offense *at which the federal statute is not aimed,* child abuse." 781 F.2d at 391 (emphasis added). Similarly, the *Brown* court, at the close of its "precise acts" analysis, said, "Mrs. Brown . . . has been prosecuted under a state statute designed to punish specific conduct *of a different character* than that proscribed in the federal assault statute." 608 F.2d at 554 (emphasis added).

[81] As the Court in *Williams* said:

> That the attorneys for the Government [sic] have recognized the force of some of these considerations is apparent from the following statement at the close of their brief: "Congress, of course, was free to fix policy for areas of federal jurisdiction even though it might conflict with local policy, and we think it has done so in respect of the instant situation."

327 U.S. at 719.

[82] United States v. Butler, 541 F.2d 730, 735 (8th Cir. 1976) (emphasis in original).

[83] *Id.*

[84] *Id.* at 731.

[85] *Id.* at 737.

[86] *Id.* "Interstate nexus" required that the gun had, at some time, traveled in interstate commerce. *Id.* at 736. "Venue" required that the receipt of the firearm had occurred in the district where the prosecution took place. *Id.* at 737 n.14.

[87] *Id.* at 737. The *Butler* court described *Williams* as determining whether a "variance of proof" changed the nature of the conduct proscribed. *Id.* at 734. In its discussion of the elements of carnal knowledge under the federal law in *Williams,* the court in *Butler* mistakenly added the elements of force by the offender and lack of consent by the victim. *Id.* at 734–35. Neither of these are included as elements of carnal knowledge, either now or when Williams committed his offense. *See* Act of 9 February 1889, ch. 120, 25 Stat. 658; *See generally* 1 F. Wharton, Criminal Law § 752 (12th ed. 1932); 75 C.J.S. *Rape* § 13 (1952). The true "variance" between the statutes amounted only to the age of consent (sixteen versus eighteen). The inclusion of the extra two elements would amount to a new federal crime of "rape of a female under sixteen years of age" (carrying a penalty far less than the "death" authorized under the actual rape statute). The court in *Butler* did not address the issues that seemingly would have been created by this interpretation. The *Brown* court also "added" the elements of force and lack of consent to the federal carnal knowledge statute used in *Williams. Brown,* 608 F.2d at 554.

[88] 574 F.2d 988 (9th Cir.), *cert. denied sub nom.* Williams v. United States, 439 U.S. 852 (1978).

[89] *Id.* at 990.

[90] *Id.* The prisoners also argued that assimilation of the sodomy statute was barred by 18 U.S.C. § 113(b) (assault with intent to commit a felony). *Id.* The court answered this by entering a "precise acts" analysis and rejecting the defendant's contention. This "backsliding" by the court does not necessarily indicate that it forgot the focus should be on legislative action respecting the generic conduct involved. This is evidenced in the words with which it concludes its "precise acts" analysis: "Congressional specificity with respect to assault does not preclude incorporation of the offense in question here under the [ACA]." *Id.* at 991.

[91] *See* United States v. Eades, 615 F.2d 617 (4th Cir. 1980). The defendant in *Eades* had been convicted, among other things, of "third degree sexual assault" under Maryland law for his activities in female locker rooms and elsewhere on the grounds of the United States Naval Academy. The court stated that "[v]iewed in its entirety, federal § 113 covers the entire range of assaults . . . [and Maryland's statute] is merely a special form of assault and battery." *Id.* at 622 (footnote omitted). Reasonable persons might come to the opposite conclusion due to the explicitly sexual orientation of the Maryland assault law (touching of the anal or genital area for sexual gratification); however, the court applied the correct (generic) text. Unfortunately, the court went on to apply what amounted to a "reverse precise acts" test, stating that the "precise acts" had been made penal because one could not commit third degree sexual assault "without committing a violation of some portion of federal § 113." *Id.* at 622. Chief Judge Haynsworth replied to this by saying, "I cannot believe that Congress, in enacting a simple assault statute providing punishment appropriate to a minor misdemeanor, could have intended to prohibit prosecution under the [ACA] of serious sex offenses. I respectfully dissent." *Id.* at 625.

required,[92] and one court decided the issue without reference to *Williams* at all.[93]

The following methodology for addressing the issue is suggested: (1) Examine any specific federal law alleged to preclude assimilation to determine whether it prohibits the gist of the offense at state law; if it does it blocks assimilation, and if it does not, (2) ensure that Congress has not "covered the field" with legislation that indicates an intent to subsume within it the gist of the offense at state law.

The use of this methodology comports with the Supreme Court's ruling in *Williams.* It is based on the "generic" approach and avoids the "precise acts" approach as used in *Fesler,* which, at its roots, is merely a *Blockburger* analysis. By stressing the gist of the offense, it attempts to get to the heart of *Williams* and to dismiss the contention that legislation generically related to the state offense in only the broad sense would act to block assimilation.

Crimes Cognizable by Courts-Martial Do Not Block Assimilation of State Crimes Against Service Members in Federal Court Prosecutions

In *United States v. Smith,*[94] a federal district court held that UCMJ art. 111, which prohibits drunken driving by service members, blocked the assimilation of state driving while intoxicated (DWI) laws in ACA prosecutions of service members in federal civilian courts.[95] The holding was based on the court's belief that because the conduct was prohibited by an enactment of Congress, there was no gap to be filled by the ACA.[96] This ruling had the effect of divesting the court of jurisdiction in any ACA case in which the assimilated state offense was also enumerated in the UCMJ. It was, and still remains, the only reported case to reach such a holding.[97]

The First Circuit rejected the district court's application of the ACA and remanded the DWI charges.[98] The court viewed the "any enactment of Congress" language of the ACA to refer to criminal laws of general applicability, such as the federal criminal code.[99] Additionally, the court recognized that military courts-martial and the civilian court system constitute separate systems of justice and that the well-established doctrine of concurrent jurisdiction[100] was thwarted by the lower court's holding.[101] Considering the treatment of *Smith* by its own circuit, and the weight of case law taking the opposite view,[102] the district court's ruling appears to be an aberration that will not be widely endorsed or followed.

State Laws That Conflict With Federal Policy Are Not Assimilated

State laws are not assimilated on federal enclaves if the "state law provision would conflict with existant federal law or policy."[103] This issue usually arises when civil plaintiffs attempt to use the ACA as an offensive weapon in litigation. For example, in *King v. Gemini Food Services, Inc.,*[104] the plaintiffs resisted joining the union with which their employer, a concessionaire at Fort Monroe, Virginia, had negotiated a "union shop" agreement.[105] They claimed that the criminal sanctions of Virginia's "Right to Work Law" were assimilated, making union shop agreements violative of federal law.[106] The court rejected this argument because it found that the National Labor Relations Act had been interpreted to permit union shop agreements.

In 1949, the restaurant concessionaire at Washington National Airport attempted to enjoin the Administrator of Civil Aeronautics from enforcing a regulation prohibiting racial segregation at the airport.[107] He based this "preemptive strike" on his claim that the ACA assimilated a section of the Virginia Criminal Code compelling the "separation of white and colored races in places of public assemblage

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[92] *See* United States v. Renville, 779 F.2d 430 (8th Cir. 1985). The defendant in *Renville* was an Indian, and the question was whether the federal crime of incest under the Indian Major Crimes Act (IMCA) blocked assimilation of South Dakota's rape statute. The defendant had performed anal intercourse and cunnilingus with his eleven year old stepdaughter; actions that constituted "rape" under South Dakota law when the victim was less than fifteen. The IMCA provided that incest would be defined and punished as under the State's law. *Id.* at 433. South Dakota's incest law explicitly limited its scope to "touching, not amounting to rape." *Id.* Because that made the IMCA incest provision inapplicable to the defendant, there was no "federal law" left to block assimilation. *Id.* at 434. Despite this finding, the court entered the "generic versus precise" battle, wrote two pages of dicta, and concluded by stating that such an inquiry was not relevant to the defendant's case.

[93] *See* United States v. Teplin, 775 F.2d 1261 (4th Cir. 1985) (citing no law on the ACA issue, not even *Eades,* a 4th Circuit case).

[94] United States v. Smith, 614 F. Supp. 454 (D. Me. 1985), *vacated sub nom.* United States v. Mariea, 795 F.2d 1094 (1st Cir. 1986).

[95] *Id.* at 459.

[96] *Id.* at 458.

[97] *See* United States v. Debevoise, 799 F.2d 1401 (9th Cir. 1986); United States v. Mariea, 795 F.2d 1094 (1st Cir. 1986); United States v. Walker, 552 F.2d 566 (4th Cir. 1977); United States v. Fulkerson, 631 F. Supp. 319 (D. Haw. 1986); United States v. O'Byrne, 423 F. Supp. 588 (E.D. Va. 1973).

[98] United States v. Mariea, 795 F.2d 1094, 1102 (1st Cir. 1986).

[99] *Id.* at 1099. "The fact that Congress has provided for a substantial overlap in offenses defined both under the UCMJ and the . . . federal code is a strong indication that Congress did not intend to preempt assimilation of state law via the ACA by enactments contained in the UCMJ." *Fulkerson,* 631 F. Supp. at 324.

[100] "The fact that an offender may be answerable to a court-martial for civilian offenses does not absolve him. [H]e is nonetheless responsible for non-military crimes before civilian courts." United States v. Colon-Padilla, 770 F.2d 1328, 1332 (5th Cir. 1985) (quoting Schmitt v. United States, 413 F.2d 219, 224–25 (5th Cir.), *cert. denied,* 396 U.S. 959 (1969)).

[101] *Mariea,* 795 F.2d at 1101.

[102] *See* cases cited *supra* note 97.

[103] King v. Gemini Food Services, Inc., 438 F. Supp. 964, 966 (E.D. Va. 1976) (citations omitted).

[104] *Id.*

[105] *Id.* at 965.

[106] *Id.*

[107] Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611, 611 (E.D. Va. 1949).

and entertainment."[108] The court ruled that the federal regulation was valid as an additional declaration and effectuation of a national policy to avoid race distinction in federal matters.[109] It stated that the ACA "is not to be allowed to override other 'federal policies as expressed by Acts of Congress' or by valid administrative orders."[110]

The ACA Does Not Adopt State Procedural Rules

In prosecutions under the ACA, federal courts are not required to follow "provisions of state law which go beyond establishing the elements of an offense and the range of punishment."[111] In fact, to do so could amount to reversible error on the part of the court.[112] Among such rules excluded from assimilation are: state rules of evidence,[113] state rights to trial by jury for petty offenses,[114] state rules concerning the sufficiency of an indictment,[115] and state statutues of limitation.[116] Similarly, federal constitutional law, as interpreted by the federal courts, applies to proceedings under the ACA.[117]

Is the State Law Susceptible to Adoption?

Some state laws are impossible to adopt for purposes of prosecution under the ACA. An example would be a state law prohibiting the defacing of the "state capitol building."[118] On the other hand, laws containing less pointed definitional references have been held to be assimilated. Examples of these are motor vehicle laws pertaining to the "public highways of this state"[119] and the offense of eluding a "police officer."[120]

Of a related nature are state laws requiring some administrative action of the state to be enforceable. These have generally been assimilated where, for example, the state law required compliance with speed limits set by state or local authorities, but which had in fact been set by the commander of a military installation.[121] Where a state statute required a traffic survey to be completed before lowering a speed limit below twenty-five miles per hour, and no survey was ever done, the state law was not assimilated.[122]

Some Selected Punishment Issues Under the ACA

It is settled that a state statute fixing the length of a prison term controls the sentence imposed under the ACA.[123] Nevertheless, the "subject to a like punishment" requirement of the ACA covers broader ground than just the sentence imposed by the court.

What Does Punishment Include?

If the sanctions imposed under a state regulatory scheme are civil, rather than punitive in nature, they may not be imposed by a federal court under the ACA.[124] In *United States v. Best,*[125] a federal magistrate sentenced a DWI defendant to ten days in jail, fined him $350, and ordered that his driver's license be suspended for six months. The defendant appealed only the suspension, contending that it

[108] *Id.* Racial segregation had been the law at Washington National Airport prior to the Administrator's promulgation of the regulation on December 27, 1948. Nash v. Air Terminal Services, 85 F. Supp. 545, 547 (E.D. Va. 1949). The same concessionaire was involved in *Rentzel* and *Nash,* and his contract with the federal government specifically called for the provision of a "separate cafeteria for colored persons." *Id.* at 547. In *Nash,* a black woman sought damages from the concessionaire because she was refused service in the dining room and coffee shop at Washington National (prior to the promulgation of the regulation at issue in *Rentzel*). The court dismissed the bulk of her complaint because the concessionaire had been acting in compliance with the former federal policy, as illustrated by his contract, and because the Virginia segregation statute had been assimilated on to Washington National Airport at the time he refused service to her. *Id.* at 548.

[109] 81 F. Supp. at 612.

[110] *Id.; accord* United States v. Warne, 190 F. Supp. 645, 658 (N.D. Cal. 1960), *aff'd in part, vacated in part on other grounds sub nom.* Paul v. United States, 371 U.S. 245, *cert. denied,* 372 U.S. 907 (1963). What types of "valid administrative orders or regulations" have the force of law, thereby blocking assimilation of contrary state law? Regulations or orders promulgated at "agency level" clearly do. *See* Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484 (1942) (Army regulation); United States v. Baker, 603 F.2d 104 (9th Cir. 1979) (Veteran's Administration regulation). Do "sub-agency" regulations also operate to preclude assimilation? Although this question is unsettled, current policy within one agency, the Army, is that "installation level" regulations do not. JAGA 1964/4031, 12 June 1964. *See generally* Corrigan, *The Case of the Missing Crime, or When is a Speed Limit Not a Speed Limit?,* The Army Lawyer, Aug. 1977, at 1.

[111] United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986).

[112] *See* United States v. Wilmer, 799 F.2d 495 (9th Cir. 1986) (judge's error in overruling a defense objection to evidence in reliance on Washington law held to be harmless where federal rules would also have allowed admission of breathalyzer calibration certificate).

[113] *Id.* at 500.

[114] *Sain,* 795 F.2d at 891.

[115] McCoy v. Pescor, 145 F.2d 260, 262 (8th Cir.), *cert. denied,* 324 U.S. 868 (1944).

[116] United States v. Andem, 158 F.2d 996 (D.N.J. 1908).

[117] Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981 (1966). "[On] the question of whether evidence was unlawfully obtained and should therefore be excluded . . . [we look] to the Constitution of the United States and not that of California." *Id.* at 253.

[118] The coverage of such a law could not be extended to include federal governmental buildings. It could only be enforced under the ACA if the "state capitol" stood on land under the exclusive or concurrent jurisdiction of the United States.

[119] *See* United States v. Kiliz, 694 F.2d 638, 630 (9th Cir. 1982) (road within Puget Sound Naval Shipyard is "any public highway of this state" for ACA prosecution under Washington law prohibiting operating a motor vehicle without a license); United States v. Barner, 195 F. Supp. 103, 105 (N.D. Cal. 1961) (roadways at McClellan Air Force Base remain "highways" despite restricted access to base).

[120] United States v. Kline, 21 M.J. 366 (C.M.A. 1986) (for ACA purposes, the term "police officer" under Maryland statute includes military policemen who regulate traffic on military installations).

[121] *See* United States v. Hillebrand, Memorandum and Order No. 76–536–M5 (D. Kan. Dec. 13, 1976) (setting up speed limits was a ministerial act that could be done by the installation commander); United States v. Metcalf, Mag. No. 8–75–1001M (D. Md. 1975).

[122] United States v. Machen, No. A225863 (E.D. Va. 1978).

[123] *See supra* note 26.

[124] *See* United States v. Best, 573 F.2d 1095, 1098 (9th Cir. 1978).

[125] *Id.*

was not "punishment" under California law and could not be assimilated.

Under California law, both the Department of Motor Vehicles and the courts had the authority to suspend the licenses of persons convicted of DWI.[126] Despite the fact that a California court could have suspended the license, the *Best* court ruled that a federal court could not.[127] The court based its ruling on California judicial interpretations of the regulatory scheme that found the suspension provisions for "first-time" DWI to be civil in nature.[128] *Best* is sound, not only in its deference to the state courts, but also because California's administrative decision to allow judges to suspend licenses does not require the conclusion that the suspension is penal in nature.

The classification of an offense is also included in the definition of punishment as applied under the ACA.[129] In *United States v. Kendrick*,[130] the court used this aspect of the ACA to fashion a solution to a problem that arose when North Carolina amended its laws to authorize up to a two-year sentence for DWI, while retaining the "misdemeanor" classification for the offense. The resulting problem was threefold: the possibility of a two-year sentence divested the magistrate of jurisdiction and meant that all DWI cases from federal enclaves within the State had to be tried at district court level; the cases would have to be submitted to a grand jury for indictment prior to trial; and the offense would have to be classified as a felony because under federal law misdemeanors can be punished by only one year's imprisonment.[131]

The court held that only those parts of the North Carolina law that did not conflict with federal law could be assimilated.[132] Because the law, when assimilated, retained its classification as a misdemeanor, and a misdemeanor at federal law could only be punished by up to one year's imprisonment, that part of the North Carolina law authorizing a sentence above one year was not assimilated.[133] This holding resulted in a convenient return to the status quo as it existed before North Carolina changed its DWI law.[134]

Disposition of Offenders Under the ACA

Many state statutes, while providing a mandatory minimum sentence to confinement, also provide for a mandatory period of incarceration without parole. While federal courts are required to follow the state guidelines as to the minimum sentence, the ACA does not require adherence to state policy with reference to parole eligibility.[135] Federal correctional policies control the conditions of confinement for ACA prisoners.[136] This prevents the potentially disruptive and practically unmanageable situation of having two separate classes of prisoners within the federal prisons: ACA prisoners and all others.[137]

Crime Victim Fund Assessments

In 1984, Congress directed the federal courts to levy special assessment on any persons convicted of offenses against the United States.[138] These assessments are in addition to any other fine or penalty imposed and amount to twenty-five dollars for a misdemeanor and fifty dollars for a felony.[139] The purpose of the assessment is to raise money in partial support of the Crime Victim's Assistance Fund.[140]

As pertains to the ACA, application of these assessments raises the following issues: are they a form of "punishment" and, if so, can they be imposed under the ACA when the state under whose law the substantive offenses have been assimilated does not contain a similar "assessment" provision which is also considered a punishment? The court in *United States v. Mayberry*[141] addressed these questions, holding that the federal assessments are punishment and that they may not be imposed in an ACA case unless the state law contains a similar provision.[142]

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[126] *Id.* at 1099.

[127] *Id.* at 1100.

[128] *Id.*

[129] *See* United States v. Easley, 387 F. Supp. 143 (N.D. Cal. 1974) (modifying sentence for second degree burglary to indicate defendant was convicted of a misdemeanor; matching the classification of crime under California law).

[130] 636 F. Supp. 189 (E.D. N.C. 1986).

[131] *Id.* at 190–92.

[132] *Id.* at 191.

[133] *Id.* at 192.

[134] Another inventive use of the definition of "punishment" can be seen in United States v. Holley, 444 F. Supp. 1361 (D. Md. 1977). The court determined that Maryland's "Probation Prior to Judgment" statute set forth a "punishment" under the ACA. Because there was no federal law providing for or preventing such an action, the assimilation of the Maryland "punishment" allowed the court to apply probation without entering judgment. *Id.* at 1363. This spared the defendant the stigma of a federal conviction.

[135] United States v. Smith, 574 F.2d 988, 992 (9th Cir.), *cert. denied sub nom.* Williams v. United States, 439 U.S. 852 (1978); *accord* United States v. Binder, 769 F.2d 595 (9th Cir. 1985); United States v. Vaughan, 682 F.2d 290, 294 (2d Cir.), *cert. denied*, 459 U.S. 946 (1982).

[136] *Smith*, 574 F.2d at 992.

[137] *Id.*

[138] Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, § 1405(a), 98 Stat. 1837, 2174–75 (1984) (codified as amended at 18 U.S.C. § 3013 (1982 & Supp. III 1985)).

[139] 18 U.S.C. § 3013(a) (1982 & Supp. III 1985). The assessments are applied on a per count basis. United States v. Dobbins, 807 F.2d 130, 132 (8th Cir. 1986); United States v. Pagan, 785 F.2d 378, 381 (2d Cir.), *cert. denied*, 107 S. Ct. 667 (1986); United States v. Donaldson, 797 F.2d 125, 128 (8th Cir. 1986).

[140] S. Rep. No. 497, 98th Cong. 2d Sess. 13, *reprinted in* 1984 U.S. Code Cong. & Admin. News, 3607, 3619.

[141] 774 F.2d 1018 (10th Cir. 1985).

[142] *Id.* at 1021. *Accord* United States v. King, 824 F.2d 313, 318 (4th Cir. 1987).

The *Mayberry* analysis is flawed for at least two reasons. First, there is some disagreement on whether the federal assessments are punishment.[143] The assessments are based not on the actual crime the defendant committed, but on its classification into two broad categories.[144] Additionally, the intent of Congress in enacting § 3013 was not to punish criminals, but was instead to provide revenue support to state crime victim compensation funds.[145] If the assessments are not "punishment," no issue remains as to their application in ACA cases.

The second defect in the *Mayberry* analysis lies in its interpretation of the ACA. It views the purpose of the Act as being to "*conform* the criminal law of federal enclaves to that of local law except in cases of specific federal crimes."[146] While this is a *benefit* of the Act,[147] the *purpose* of the ACA is to "fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses."[148] Thus even if *Mayberry* is correct about the nature of the assessments, its application of them to the ACA is skewed by its misapprehension of the purpose of the Act.

If the purpose of the ACA were "conformity," (and it is not), then Congress might have intended to override the collection of the assessments. But state laws contrary to federal policy are not assimilated;[149] and here the state law assimilated is the "absence" of a similar assessment. Furthermore, an analogy to the "parole cases,"[150] in which state laws requiring mandatory minimum periods of incarceration were held not to affect the operation of the federal correction system, is in order. Congress did not intend the treatment of those convicted under the ACA to "conform" to state law to the extent that it degraded the operation of federal prisons. In like manner, Congress probably did not intend for the Act to operate to the detriment of an entirely separate federal program like the Crime Victim's Assistance Fund.

United States v. Robertson[151] suggests still another reason why the ACA and the federal assessments can peacefully coexist. The *Robertson* court pointed out that the original intent behind the adoption of state punishments under the ACA was to ensure that the offender's punishment fit the crime.[152] Because the assessments are charged without regard to the nature of the offense, except the fact that a felony costs twenty-five dollars more than a misdemeanor, they are probably unrelated to the ACA's definition of punishment. For these reasons, collection of the federal assessments is proper in ACA cases.

Conclusion

For over 160 years, the ACA has operated to supplement federal law to provide a more complete criminal code for federal enclaves within the various states. During those years, its language has remained relatively unchanged, but its application, in both territory covered and frequency of use, has significantly increased. With the current trend towards assimilating state laws in areas such as child sexual abuse, questions concerning its operation will continue to come before the courts. In resolving these questions, courts should look to the purpose of the Act and remember that it is intended by Congress to operate in conjunction with, and not in opposition to, other federal laws, programs, and policies. That perspective can lead the courts to the proper resolution of the myriad issues arising under the ACA and be of far greater assistance than any test or formula.

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[143] For the proposition that the assessments are not punishments see *Dobbins*, 807 F.2d at 131; *Donaldson*, 797 F.2d at 127. *But see* United States v. Smith, 818 F.2d 687 (9th Cir. 1987) (upholding assessments as punishment under seventh amendment challenge); United States v. Ramos, 624 F. Supp. 970, 973 (S.D. N.Y. 1985) (upholding constitutionality of 18 U.S.C. § 3013 because it is a punishment and not a revenue measure "originating in the Senate").

[144] *Donaldson*, 797 F.2d at 127.

[145] *Id.*

[146] *Mayberry*, 774 F.2d at 1020 (emphasis added).

[147] The *Mayberry* court appears to see "conformity" as a product of congressional concern for the rights of the individuals who enter upon federal enclaves. *Press Publishing Co.*, upon which *Mayberry* relies, instead viewed it as an acknowledgement of "states rights." *See supra* text accompanying notes 11–16. In United States v. King, 824 F.2d 313 (4th Cir. 1987), the court adopted the *Mayberry* court's view that the assessments could not be applied in ACA prosecutions unless the corresponding state law provided for a "like punishment." *King* cited United States v. Sharpnack, 355 U.S. 286 (1958) for the proposition that conformity is the driving force behind the ACA. This reliance on *Sharpnack* may be overstated because that case was concerned with whether there was an unconstitutional delegation of congressional authority instead of how closely Congress intended to conform to state punishment schemes. *See supra* text accompanying notes 8–10.

[148] United States v. Williams, 327 U.S. 711, 719 (1946).

[149] *See supra* text accompanying notes 103–10.

[150] *See supra* text accompanying notes 135–56.

[151] 638 F. Supp. 1202 (E.D. Va. 1986). *Robertson* concerned a DWI conviction for an offense that occurred on a Naval base.

[152] *Id.* at 1215 n.20. It should be noted that for reasons of judicial consistency, the court in *Robertson* reluctantly followed the *Mayberry* holding.

Distant Replay: Retrial of Charges After Appellate Dismissal

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If at first you don't succeed, try, try again. So says folk wisdom. For prosecutors, there are limits on those who may be tried again. The Constitution prohibits double jeopardy.[1] That prohibition, however, is not absolute. In some instances, an accused may be tried twice for the same offense. This is especially true when charges are dismissed by an appellate court. Like bad pennies or boomerangs, counsel and the accused may find charges set aside on appeal coming back for retrial. The reasons for the appellate court's decision determine whether there will be a "distant replay" of the dismissed charges.

Burks v. United States

In general, an accused who successfully appeals his case may be retried.[2] In *Burks v. United States*,[3] the Supreme Court narrowed that rule. The Court held that there may be no retrial where an appellate court dismisses charges because the record of trial contains insufficient proof of guilt. An accused could be tried a second time if charges are dismissed on appeal because of "trial error." The Court explained the distinction in treatment between evidentiary insufficiency and trial error.

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.[4]

The *Burks* rule logically follows from the Supreme Court's concept of "continuing jeopardy."[5] "Continuing jeopardy" means that until criminal proceedings have run their full course, the accused remains in jeopardy. The jeopardy from the first trial follows the accused through the appellate process.

If trial error results in reversal on appeal, the accused is theoretically retried under the same jeopardy as the original trial. The Sword of Damocles hands continuously through trial and appeal and continues to hang through retrial and further appeal until the proceedings run their full course.

On the other hand, if the charges are dismissed because of evidentiary insufficiency, the proceedings have run full course. The original trial jeopardy has been stopped. The appellate court has found the accused not guilty. The Sword of Damocles has fallen and missed.

Burks and the Military

Rule for Courts Martial 907(b)(2)(C)[6] and Article 44, Uniform Code of Military Justice[7] contain the basic prohibition on former jeopardy in the military. They make the concept of "continuing jeopardy" applicable to the military. R.C.M. 907(b)(2)(C) states: "No court-martial proceeding in which an accused has been found guilty of any charge . . . is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed."[8]

The *Burks* rule flows from the concept of continuing jeopardy and is also reflected in the UCMJ and the Manual for Courts Martial. Article 66, UCMJ, for example provides:

> If the Court of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.[9]

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[1] U.S. Const. amend. V.

[2] United States v. Ball, 163 U.S. 662 (1896).

[3] Burks v. United States, 437 U.S. 1 (1977).

[4] *Id.* at 15.

[5] *See* Green v. United States, 355 U.S. 184 (1957); *see also* Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984).

[6] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 907(b)(2)(C) [hereinafter R.C.M.].

[7] 10 U.S.C. § 844 (1982) [hereinafter UCMJ].

[8] R.C.M. 907(b)(2)(C)(iii).

[9] UCMJ art. 66(d).

The discussion of R.C.M. 1203(b) contains the same language. R.C.M. 1107 is another example of the *Burks* rule at work in military law. The rule discusses the limitations on a convening authority's power to order a rehearing.

> A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is an admissible substitute. [10]

Insufficiency and Evidentiary Trial Error

The line between evidentiary insufficiency and trial error is not always a sharp one. The two may overlap. The best example of this overlap occurs when the appellate issue concerns admissibility of evidence. The appellate court may hold that evidence should not have been admitted at trial. Absent the erroneously admitted evidence, the record may not contain sufficient evidence to sustain the conviction. Should the appeals court dismiss the charge for insufficiency of proof in such an instance?

This question has been answered by several of the circuit courts of appeal. In *United States v. Mandel,* [11] the Court of Appeals for the Fourth Circuit held that retrial is permissible when evidence admitted at trial is excluded on appeal. Exclusion of the evidence does not require the appellate court to reassess the remaining evidence with an eye toward dismissal for insufficiency of proof. The Fourth Circuit explained the reasoning behind this ruling:

> [One] reason for not requiring an appellate court to adjudge the sufficiency of the balance of the evidence, when a part of the evidence has been improperly admitted, it that is is impossible to say what other evidence the government might have produced had the faulty evidence not been admitted, and what theory of the case the government might have principally pursued. [12]

The Seventh [13] and Eighth [14] Circuits have ruled similarly. The Court of Appeals for the Ninth Circuit applied the same rationale and reached the same conclusion in *United States v. Harmon:* [15]

> It is impossible to know what additional evidence the government might have produced had the faulty evidence been excluded at trial. . . . It would prolong trials unduly to adopt a rule that would require the government to introduce all available evidence and assert every possible legal theory . . . in anticipation of reversal. [16]

The Ninth Circuit refined this analysis in *United States v. Bibbero.* [17] In *Bibbero,* the court held that an appellate court, after ruling some evidence inadmissible, may properly analyze the sufficiency of the evidence. Such an analysis of evidentiary sufficiency must include the evidence excluded by the appellate court. "If all the evidence the government produced at a defendant's first trial, including that which should not have been admitted, is insufficient to support the conviction, then the government has had its proverbial 'one bite at the apple' and any retrial would be forbidden." [18]

United States v. Marolda [19] provides one more twist on the general rule that reprosecution is not barred by an appellate court's suppression of evidence. *Marolda* holds that reprosecution is barred on double jeopardy grounds if there was no evidence available to the government other than the evidence excluded on appeal.

A Military Hypothetical

Military appellate courts usually set aside the findings and sentence and order a rehearing if they find trial error. This is the procedure contemplated by Article 66(d), UCMJ. If the appellate court chooses not to order a rehearing, then the same Article requires the court to dismiss the charge.

Situations may arise where an appellate court finds trial error but does not order a rehearing on the charge. There may be many remaining charges. The charge affected by the trial error may be a minor one that does not affect the sentence. Because the court would not order a rehearing in such a case, the charge must then be dismissed.

Such a case might, however, be returned for a rehearing because of issues raised subsequent to the appellate dismissal. Also, a ruling by a higher court might subject the case to a rehearing. For example, some accused are now raising post-trial sanity issues that lead to rehearings. [20] These situations may lead to retrial of charges previously dismissed by an appellate court on grounds of trial error.

Conclusion

Retrial of charges or specifications *dismissed* because of "trial error" should be allowed in the military even if a military appellate court chose not to order a rehearing on that charge or specification. If the case is returned for a rehearing after such a charge or specification has been dismissed, it is within the spirit of the language in the UCMJ and the

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[10] R.C.M. 1107(e)(1)(C)(ii).

[11] 591 F.2d 1347 (4th Cir.), *rev'd en banc on other grounds,* 602 F.2d 653 (4th Cir. 1979).

[12] *Id.* at 1374.

[13] United States v. Tranowski, 702 F.2d 668 (7th Cir. 1983).

[14] United States v. Sarimento-Perez, 667 F.2d 1239 (8th Cir. 1982).

[15] 632 F.2d 812 (9th Cir. 1980).

[16] *Id.* at 814.

[17] 749 F.2d 581 (9th Cir. 1984).

[18] *Id.* at 586. n.3.

[19] 648 F.2d 623 (9th Cir. 1981).

[20] *See, e.g.,* United States v. King, 24 M.J. 774 (A.C.M.R. 1987).

Manual to permit a retrial.[21] It is certainly within the Supreme Court's *Burks* rule.

If a military appellate court decides to dismiss a charge affected by trial error rather than order a rehearing, that dismissal should not have the effect of a finding of not guilty. Such a rule would elevate judicial economy above the interests of justice. Dismissal by the military appellate courts should not carry any greater effect than dismissal by other federal appellate courts. Such dismissal by an appellate court does not imply anything about the accused's guilt or innocence. Therefore, the *Burks* rationale should apply.

The military should also follow the lead of the courts of appeal and allow retrial when trial error stems from erroneously admitted evidence. The rationale for that rule in the courts of appeal applies with equal, if not greater, force in the military. It is as inefficient for the military prosecutor as it is for his or her federal counterpart to be required to pursue every theory and introduce every potential piece of evidence. The holding in *Bibbero* is the only meaningful way to reconcile sufficiency assessments with trial error evidentiary issues. A decision contrary to *Bibbero* would effectively deny retrial in cases of erroneously admitted evidence.

Military appellate courts must make clear their reasons for dismissing charges and specifications. If a case then returns to a convening authority, double jeopardy issues will be more clearly framed. In light of *Marolda*, the appellate courts should carefully state whether a dismissal after evidentiary trial error is granted because no other government evidence could have been offered at trial.

Certainly the reasons for retrial in federal courts are equally applicable to military courts. Therefore, while these issues may appear remote, trial counsel may be arguing them in the near future to give genuine meaning to justice in those cases requiring a rehearing.

[21] Especially pertinent to this point is the language in R.C.M. 1107(e)(1)(C)(ii) authorizing a convening authority to order a rehearing "[I]f the proof of guilt consisted of inadmissible evidence for which there is an admissible substitute."

The Advocate for Military Defense Counsel

Mistake of Fact: A Defense to Rape

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Defense counsel can raise the defense of mistake of fact when their client has been charged with rape. This defense is available when an accused, through his own testimony or other circumstantial evidence, asserts that, regardless of the victim's actual state of mind, the accused honestly and reasonably believed she was consenting to the sexual intercourse. Counsel who are unaware of the application of the mistake of fact defense in rape cases may simply rely on the argument that the victim consented to the intercourse, and thus overlook the possibility that their client might have an affirmative defense.

Mistake of Fact: What Is It?

A mistake of fact consists of an unconscious ignorance or forgetfulness of a fact, past or present, material to the transaction; it exists where a person understands the facts to be other than they actually are, as where some fact which really exists is unknown, or some fact is supposed to exist which really does not or did not exist. [1]

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense."[2] In a general intent offense such as rape, the evidence must be sufficient to enable the finder of fact to reasonably infer the existence of such a mistake and that the mistake was reasonable.[3] In the case of rape, "[a] man will be justified in assuming the existence of consent if the conduct of the [victim] toward him at the time of the occurrence is of such a nature as to create in *his mind* an honest and reasonable belief that she has consented by yielding her will freely to the commission of the act."[4]

In the past, military appellate courts that examined the application of the mistake of fact defense to rape cases either disavowed the application of the defense or held that

[1] 54 Am. Jur. 2d *Mistake, Accident, or Surprise*, § 4, at 450 (1971).

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(j) [hereinafter R.C.M.]. Dep't of Army, Pamphlet No. 27-9, Military Judge's Guide, para. 5-11 (1 May 1982) (C1, 15 Feb. 1985), provides sample instructions concerning the mistake of fact defense.

[3] United States v. McFarlin, 19 M.J. 790, 793 (A.C.M.R.), *petition denied*, 20 M.J. 314 (C.M.A. 1985). For a discussion of other general and specific intent offenses and the mistake of fact defense, see Harper, *Applying the "Mistake of Fact" Defense*, 13 The Advocate 408 (1981).

[4] 65 Am Jur 2d, *Rape*, § 10, at 767 (1972) (emphasis added).

the evidence did not support the defense.[5] The courts had no strong guidance to follow. In *United States v. Carr*,[6] however, the Court of Military Appeals held that an honest and reasonable mistake of fact as to the victim's consent was available as a defense to a rape charge. After the decision in *Carr*, there were no reported military cases where the accused was actually found to have held an honest and reasonable belief that the woman consented to the sexual intercourse until the decision of the Air Force Court of Military Review in *United States v. Baran*.[7] In *Baran*, the court held that the defense of mistake of fact was raised and that the government failed "to disprove beyond a reasonable doubt the affirmative defense of reasonable and honest mistake of fact."[8] The victim in *Baran* asserted at trial that although she could not remember anything about her sexual encounter with the accused, she knew that she would not have consented under the circumstances. The accused admitted having sexual intercourse with the alleged victim, but he maintained that she consented and responded to his sexual advances.[9]

How Is the Defense of Mistake of Fact Raised?

An affirmative defense is reasonably raised by "some evidence" presented by either the government or the defense.[10] The defense of mistake of fact is generally raised by the testimony of the accused.[11] The accused's state of mind may also be shown by circumstantial evidence, however.[12] The basis for the mistake of fact defense is that an accused can justifiably assume the existence of consent if the alleged victim's conduct and the circumstances surrounding the incident were of such a nature as to create an honest and reasonable belief she had consented. When there is a credibility dispute between the alleged victim and the accused regarding consent, the assertion of mistake of fact may be an important strategy consideration for the defense.[13]

The mistake of fact defense should not be confused with the alternative defense of "lack of consent." Many practitioners are under the impression that once the fact finder has concluded that the element of "lack of consent" has been met, there can be no mistake of fact. Indeed, the victim can be found to have not, in fact, given her consent to the sexual intercourse but the accused, nevertheless, can be exonerated of the offense because he honestly and reasonably held the mistaken belief that she did consent.[14]

The distinction between the consent defense and the mistake of fact defense is often blurred. A mistake of fact instruction does not become unnecessary because the members are instructed on the element of consent. The distinction between the two defenses is clearly set out in the California Court of Appeals case of *People v. Romero*:[15]

> The defense of consent and the [mistake of fact] defense are two distinct defenses. Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth. The [mistake of fact defense], on the other hand, permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not.

In evaluating the mistake of fact defense, the fact finder must examine the circumstances from the point of view of the accused.[16] Is it possible, under the circumstances, that the accused believed the victim willingly engaged in sexual intercourse with him? Did the accused perceive consent, even though there may have been no consent in fact? Was the conduct of the victim such that the accused may have honestly misread her conduct as consenting? Finally, was the accused's belief reasonable?

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[5] United States v. Moore, 15 M.J. 354 (C.M.A. 1983); United States v. Jones, 10 C.M.A. 122, 27 C.M.R. 196 (1959); United States v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954); United States v. Henderson, 4 C.M.A. 268, 15 C.M.R. 268 (1954);, United States v. Steward, 18 M.J. 506 (A.F.C.M.R. 1984); United States v. Mahone, 14 M.J. 521 (A.F.C.M.R. 1982); United States v. Perry, 12 M.J. 920 (N.M.C.M.R. 1982); United States v. Clifton, 11 M.J. 842 (A.C.M.R. 1981), *rev'd on other grounds*, 15 M.J. 26 (C.M.A. 1983); United States v. Lewis, 6 M.J. 581 (A.C.M.R. 1978); United States v. Burt, 45 C.M.R. 557 (A.F.C.M.R. 1972); United States v. Steele, 43 C.M.R. 845 (A.C.M.R. 1971); United States v. Graham, 23 C.M.R. 627 (A.C.M.R. 1957).

[6] 18 M.J. 297, 301 (C.M.A. 1984).

[7] 23 M.J. 736 (A.F.C.M.R. 1986).

[8] *Id.* at 739.

[9] The evidence showed that the accused, Sergeant Baran, the alleged victim, and several other soldiers engaged in a drinking game in Baran's barracks room. The victim, who had passed out, woke up in bed with another soldier. The victim recalled having sexual intercourse with one soldier and possibly another, but did not recall having intercourse with Baran. Baran admitted having sexual intercourse with the victim, but maintained it was consensual and asserted that the victim was awake, physically responsive, moaned and said his name during the intercourse. The government tried to prove the rape charge by showing that Baran engaged in sexual intercourse with the victim when she was so drunk as to be incapable of giving her consent and that the victim would not have agreed to the sexual intercourse if she had been sober. *Id.* at 737–38.

[10] United States v. Tan, 43 C.M.R. 636 (A.C.M.R. 1971).

[11] United States v. McFarlin, 19 M.J. at 793.

[12] *Id.*

[13] *See* United States v. Robertson, 13 M.J. 387 (C.M.A. 1982) (summary disposition) (Everett, C.J., dissenting).

[14] "[A]lthough common law requirements of resistance in rape cases have been greatly mitigated over the years, it seems unlikely that Congress intended for a service member to be subject to conviction of rape . . . with someone who 'acquiesced' but did not 'consent.'" United States v. Moore, 15 M.J. 354, 374 (C.M.A. 1983) (Everett, C.J., dissenting). "[A] female can honestly believe she has been raped, when, as a matter of law, she has not. . . . [I]f the female does not consent to sexual intercourse but fails to make her lack of consent reasonably manifest, no rape has occurred." United States v. Tomlinson, 20 M.J. 897, 902 (A.C.M.R. 1985) (citations omitted).

[15] 171 Cal. App. 3d 1149, 1156, 215 Cal. Rptr. 634, 637–38 (1985).

[16] People v. Osborne, 77 Cal. App. 3d 472, 479, 143 Cal. Rptr. 582, 586 (1978).

What Should Defense Counsel Expect When Raising the Defense of Mistake of Fact?

Defense counsel must be alert to those cases where the circumstances may give rise to a mistake of fact defense. Even though counsel desires to rely primarily on consent as a defense to the charge of rape, counsel may be able to develop sufficient facts through the accused or other witnesses to also raise the mistake of fact defense. Alternative defenses are available to the accused. The accused can argue in the first instance that the alleged victim consented to the sexual intercourse. In the alternative, the accused can argue that, based on the conduct of the victim and the circumstances surrounding the incident, he honestly and reasonably believed the victim consented to the intercourse. If sufficient supporting evidence is raised, the accused will at least be entitled to an instruction on the defense.

In many cases, an accused can rely on the same facts to support the defenses of mistake of fact *and* consent. While defense counsel may opt to proceed with only the defense of consent to avoid confusing the court members with alternate defenses, counsel must consider that in doing so they may be giving up an effective defense for their clients. Defense counsel can usually avoid the problem of court member confusion and can clarify defense strategy by discussing the two alternative theories with the court members during voir dire, in the opening statement, and in closing argument. When the same facts used to support a defense of consent can support a defense of mistake of fact, counsel may broaden their client's defense and thereby increase their chances of success by carefully and clearly presenting both defenses to the court.

A final consideration in favor of raising the mistake of fact defense is that doing so adds to the government's burden of proof. In prosecuting a rape case where the accused raises the defense of mistake of fact, the government must first prove that the alleged victim did not consent to having sexual intercourse with the accused. "Once this has been established, it must then disprove the affirmative defense of reasonable and honest mistake of fact." [17]

Instructions to the Court Members

The military judge is required, sua sponte, to instruct the fact finders on affirmative defenses reasonably raised by the evidence. [18] A defense is reasonably raised when the record contains some evidence to which the court-martial panel may attach credit if it so desires. [19] The military judge is not to judge the credibility of the evidence, [20] even if the sole source of the evidence is the testimony of the accused. [21] If the evidence is wholly incredible or unworthy of belief, however, the defense is not raised and an instruction on that defense is not required. [22] The military judge should resolve any doubt as to sufficiency of the evidence supporting an instruction in favor of the accused. [23]

If the military judge's instructions are imprecise, defense counsel are obligated to raise an objection. [24] The failure to object to the omission of an instruction before the members close to deliberate may constitute waiver of the objection. [25] Also, defense counsel should be aware that the military judge may try to discount a request for an instruction based on the reasoning that the victim either consented or she did not, and that that is the only issue.

In cases where error has been alleged on appeal because the military judge failed to instruct at trial on the affirmative defense of mistake of fact, the government often takes the position that the objection was waived due to the failure of the defense counsel to raise an objection or request the instruction. The government argues that the absence of a request by defense counsel indicates there was no evidence that raised the defense of mistake of fact. The government usually will also argue that a mistake of fact instruction is unnecessary when the military judge provides an instruction on the victim's failure to make manifest her lack of consent through the exercise of appropriate resistance. [26]

As noted above, although the court members may decide the issue of actual consent adversely to an accused, that determination does not necessarily resolve the issue of whether an accused honestly and reasonably believed the victim had consented. The mistake of fact defense cannot be rejected by the court members when they are never instructed that such a separate defense is possible and is at issue. [27] The accused has a right to have the court members determine every material issue presented by the evidence. Accordingly, trial defense counsel should be alert to their responsibility to request the mistake of fact instruction, object if it is not given, and counter government arguments that such an instruction is not needed.

Conclusion

The Court of Military Appeals has made it clear that the mistake of fact defense is available to those charged with rape. Therefore, counsel should not let the opportunity pass to broaden their client's defense strategy to include this

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[17] United States v. Baran, 23 M.J. at 739.

[18] United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975). *See* United States v. Gaiter, 1 M.J. 54, 56 (C.M.A. 1975):
Regardless of the lack of objection, it is the duty of the military judge to act on his own initiative in those situations in which he is presented with an issue so intertwined with the elements of the offense that informed consideration by the court members is impossible in the absence of instructional enlightment.

[19] United States v. Tan, 43 C.M.R. 636 (A.C.M.R. 1971); *see also* United States v. Jackson, 12 M.J. 163 (C.M.A. 1981).

[20] United States v. Tulin, 14 M.J. 695 (N.M.C.M.R. 1982).

[21] United States v. Franklin, 4 M.J. 635, 638 (A.F.C.M.R. 1977).

[22] *Id.*

[23] United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981).

[24] United States v. McLaurin, 22 M.J. 310, 313 (C.M.A. 1986).

[25] R.C.M. 920(f).

[26] United States v. Steel, 43 C.M.R. 845, 849 (A.C.M.R. 1971) (Collins, J. concurring). The government may take the position that an instruction on force and lack of consent is "advantageous to the [accused] in that he does not have to meet the burden of showing his mistake to be both honest and reasonable." United States v. Perry, 12 M.J. 920, 922 (N.M.C.M.R. 1982).

[27] *See* People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975).

"special defense."[28] Counsel should carefully examine the facts in their cases to determine whether, under the circumstances, their client's belief that the woman was consenting was an honest and reasonable one. Counsel should develop facts supporting the mistake, and should request the military judge to instruct on mistake of fact even in cases where the defense relies primarily on the assertion that the victim did, in fact, consent to the sexual intercourse.

[28] R.C.M. 916(a).

DAD Notes

Sentence Considerations for Soldiers Committing Off-Post Offenses

The recent U.S. Supreme Court opinion in *Solorio v. United States*[1] has significantly broadened the jurisdiction of military courts. Court-martial jurisdiction now depends solely on the status of the accused as a member of the armed forces and not on whether the offenses are service connected. As a result, soldiers will now face military court-martial prosecution for offenses that heretofore fell solely within the jurisdiction of state or other federal courts.[2] In many cases, the maximum punishment for a violation of the Uniform Code of Military Justice[3] exceeds the maximum punishment under state and federal law. Thus, it is now possible that soldiers found guilty of crimes could receive more severe sentences than civilian defendants convicted of the same offenses, simply because their status allows them to be prosecuted in the military justice system.

When the government prosecutes a military accused who has allegedly committed off-post offenses, defense counsel should present evidence of the applicable state or local sentencing practice during the extenuation and mitigation phase of the court-martial. Rule for Courts-Martial 1001(c)(1)(B),[4] allows a defense counsel to present matters in mitigation to furnish grounds for a recommendation of clemency. Therefore, a military judge should entertain a request from defense counsel to take judicial notice of the pertinent state or other federal law, including the maximum punishment. Military law recognizes the propriety of military judges considering the sentences received by other accuseds for convictions resulting from similar misconduct, especially where an accused faces a highly disparate sentence.[5] Therefore, it would seem proper for a defense counsel to request either a local attorney or a court clerk, knowledgeable about the disposition of like offenses in local courts, to testify as to the sentences issued by the local courts for similar offenses. Once such evidence is before the court, counsel can then argue in equity that the local law and practice is the proper sentencing standard to apply. If the trial judge precludes counsel from presenting such evidence at trial, then counsel should consider raising evidence of the local law and practice to the convening authority before the convening authority acts on the accused's sentence.[6]

Arguably, the offenses most likely to result in disparate treatment of military accuseds are marijuana and drunk driving offenses. During my experience as the magistrate court prosecutor at Fort Leavenworth, Kansas, I noticed that possession offenses involving small amounts of marijuana were either not prosecuted in state and federal courts, or the offender was granted diversion from prosecution. Likewise, a person accused of drunk driving was frequently given diversion from prosecution if his blood alcohol content was below a specified level so long as the drunk driving resulted in no property damage. If an offender successfully completed the diversion program, the charge was generally expunged from police records. Diversion is a popular choice where state laws mandate jail time for the first conviction of drunk driving. On the other hand, marijuana and drunk driving offenses are seldom handled lightly within the military justice system. Violations of Articles 111 and 112a generally result in at least nonjudicial punishment, if not court-martial prosecution. A military offender thus receives punishment and often a permanent scar on his record, such as a punitive discharge or federal conviction, whereas his civilian counterpart either is not punished at all or his life is not otherwise appreciably affected.

Now more than ever, defense counsel should familiarize themselves with state and federal law and local practice. By establishing and maintaining a good rapport with local attorneys, counsel can keep abreast of local trends and policies relevant to sentencing. Once this evidence is before the military court, counsel can argue that the equitable direction for the judge to take is to limit punishment in conformity with state and federal law and local community standards. Captain Wayne D. Lambert.

Preserving the Issue for Appeal

The Court of Military Appeals in a recent case, *United States v. Welch*,[7] illustrated how a defense counsel's conduct subsequent to an adverse ruling on a proffer under

[1] 107 S. Ct. 2924 (1987).

[2] *See* O'Callahan v. Parker, 395 U.S. 258 (1969).

[3] 10 U.S.C. §§ 801–940 [hereinafter UCMJ].

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(c)(1)(B) [hereinafter R.C.M.].

[5] *See* United States v. Mann, 22 M.J. 279 (C.M.A. 1986); United States v. Ballard, 20 M.J. 282 (C.M.A. 1986); United States v. Snelling, 14 M.J. 267 (C.M.A. 1982); United States v. Olinger, 12 M.J. (C.M.A. 1982); United States v. Davis, 20 M.J. 980 (A.C.M.R. 1985).

[6] United States v. Mann, 22 M.J. 279 (C.M.A. 1986); R.C.M. 1105(b)(3) and 1106(d)(5).

[7] 25 M.J. 23 (C.M.A. 1987).

Military Rule of Evidence 412 can waive or render harmless an issue on appeal.

Appellant was charged with, among other things, the rape and forcible sodomy of a twelve year-old girl. At trial the government presented the testimony of the victim and of a pediatrician who testified that the victim had a "flatulous" vagina, which she characterized as unusual for a twelve-year-old girl, and which was consistent with the victim's assertions that she had sex with the appellant. The defense requested permission to question the victim concerning sexual acts with two other identified individuals occurring prior to the physical examination by the pediatrician. The military judge initially ruled that the defense proffer was not specific enough as to time and place. He felt that the questions were mere speculation and a "fishing expedition," and therefore not allowed under Mil. R. Evid. 412. The military judge allowed the defense to raise the motion at a later time if it so chose, however.

The defense did not raise the issue again. Twice the military judge sua sponte brought up the matter. The first time was after the testimony of an official at the victim's school alluded to an acknowledgement by the victim of other sexual activity. The second time was prior to the instructions on findings. In both instances, the defense counsel stated that he wanted to preserve the motion for the record and that it would be a bad tactical decision to reassert the motion because he felt the members would perceive his efforts as a cheap shot and become sympathetic to the victim.

On appeal, the appellant raised as error the refusal by the military judge to allow the defense to present evidence of the past sexual history of the victim. The court held that the initial decision by the military judge prohibiting testimony concerning the victim's sexual activities was an abuse of discretion. The issue of the physical condition of the vagina had been raised by the government and the victim's sexual history directly related to that issue. Also, the testimony of the school official made the evidence relevant. The subsequent actions of the military judge allowing the defense to pursue the matter, however, and the defense's failure to do so, persuaded the court that the issue had been waived. The court felt that the defense had adequate opportunity to set the record straight on the issue of the victim's physical condition. In face of the "overwhelming" evidence against the appellant, the court found that reopening the case at any time to litigate the matter could be viewed by the members as "a cheap shot." In addition, the court stated that the defense had lessened the impact of the pediatrician's testimony through cross-examination.

The lesson of this case is that the defense should take advantage of every opportunity to reassert a motion. Here the initial denial of the motion by the military judge was not a final ruling. It appears that the defense counsel erroneously thought the issue would be preserved for appeal and that for tactical reasons he could disregard the judge's strong signals to bring it up again. As a result, the subsequent failure to reassert the issue negated the defense counsel's substantial earlier efforts and resulted in waiver. Captain Mary C. Cantrell.

Excited Utterance—Not Quite

In *United States v. Ansley,*[8] the Army Court of Military Review ruled that statements made by the alleged three-year-old victim of indecent acts, made shortly after the incident to the child's mother, were not admissible as excited utterance exceptions to the hearsay rule.[9] The court, relying on *United States v. LeMere,*[10] held that in order to determine the admissibility of such statements, the court was required to use a subjective analysis of the child's degree of excitement in relation to the incident. This mandates a two-step analysis. First, the event must be reviewed through the eyes of the child in order to decide whether she perceived it to be startling. It is inconsequential whether it would be startling to someone else. Second, if the event was startling to the declarant, there must be a clear showing that she made the statements while under the stress of the event.

In *Ansley*, the court ruled that the statements in question did not qualify as excited utterances, even though they were made shortly after the alleged incident and the first statement was spontaneously volunteered by the declarant, because the statements were made in a calm fashion and the child displayed no signs of excitement. This case illustrates the principle that excited utterance determinations are to be based primarily on the state of mind of the declarant at the time the statements were made, and not on how stressful others perceive the event to be. In litigating such issues, especially when children are involved, defense counsel should emphasize those factors that indicate that the event did not have a great impact on the declarant even though it may appear traumatic to the average person. Captain John J. Ryan.

Rating Challenges for Cause

The issue of challenges for cause based on the rater-rated relationship came before the Army Court of Military Review in *United States v. Eberhardt.*[11] When the same issue was presented to the Air Force Court of Military Review, that court created a per se rule disqualifying any member who is the rating officer of another member.[12] Although the Army court found error in *Eberhardt,* it declined to follow the Air Force decision and rejected a per se disqualification rule. The court did state however, that "[c]ircumstances of this nature are of serious concern and demand additional inquiry at both the trial and appellate level."[13]

The court's rationale for not adopting a per se rule was that it would adversely affect the administration of military justice and could "create a military justice 'nightmare' for a

[8] 24 M.J. 926 (A.C.M.R. 1987).

[9] Mil. R. Evid. 803(2).

[10] 22 M.J. 61 (C.M.A. 1986).

[11] 24 M.J. 944 (A.C.M.R. 1987).

[12] United States v. Murphy, 23 M.J. 764 (A.F.C.M.R. 1986), *certificate for review filed,* 23 M.J. 374 (C.M.A.), *petition for grant of review filed (cross petition),* 24 M.J. 75 (C.M.A. 1987).

[13] 24 M.J. at 946.

commander in a combat zone" by requiring him to choose between military justice and the mission.[14]

Although the court declined to adopt a per se disqualification rule, it did stress two points that are important for defense counsel. First, the court said that mere exculpatory declarations of impartiality by members in response to the military judge's leading questions are not sufficient to ensure the appearance of fairness or legal propriety. Second the court emphasized that the issue was preserved for review because the defense counsel proffered that another member would have been peremptorily challenged but for the denial of the challenge for cause. The failure of the defense counsel to identify which member he would have challenged was not significant. Captain Debra D. Stafford.

Presto: How Far Can You Go in an Attempt Offense?

Consider a scenario where a soldier agrees to try to obtain drugs for a confidential source and a covert agent of the Criminal Investigation Command (CID). In furtherance of this objective, the soldier places several telephone calls to check the availability of drugs. The accused takes no other actions to obtain the drugs. Under these facts would the accused soldier's pleas to attempted distribution be provident? In *United States v. Presto,*[15] the Court of Military Appeals held, based on the facts outlined above, that the accused's pleas were improvident because his conduct amounted to no more than mere preparation.[16]

Article 80, UCMJ,[17] requires that the accused go beyond mere preparation; his conduct must be a substantial step toward the commission of the offense. A substantial step towards the commission of the offense must be "conduct which is strongly corroborative of the firmness of the defendant's criminal intent."[18] Notwithstanding this language, the court noted that the line of demarcation between mere preparation and a substantial step towards the offense is not always clear.[19]

The Army Court of Military Review had applied this standard to the above facts and concluded that the accused's acts constituted a direct movement toward the distribution of drugs.[20] Believing that the accused had placed an order for drugs when contacting his source, the Army court had stated that "[u]nder the circumstances, placing an order with the supplier was the final step necessary to complete the transaction, save only the formalities of the exchange of the drugs for the purchase money."[21]

The Court of Military Appeals, however, found that the accused had not placed an order with the supplier.[22] In addition, the court strongly relied on the fact that the accused never received any purchase money for the drugs.[23] Furthermore, if drugs were located, the accused would still have had to negotiate a price and pick up the drugs. The court concluded that preliminary telephonic inquiries with a view to locating a source of contraband constituted no more than mere preparation.[24] Because too many steps remained before the distribution could be consummated, the facts were insufficient to sustain the accused's guilty plea for attempted distribution.

Presto delineates the difficulty in defending and prosecuting attempt offenses. Determining when an accused's conduct has crossed from mere preparation to a substantial step towards the commission of an offense is a question of fact, not law. Defense counsel now have some guidance in determining when that line has been crossed in drug distribution cases. Captain Joseph Tauber.

The Excited Utterance Exception to the Confrontation Clause

On 30 September 1987, the United States Court of Military Appeals rendered its decision in *United States v. Arnold.*[25] The court noted that this was "yet another case where the Government proved its case through use of an accused's confession and statements made to an intermediary by the complaining witness."[26] The holding in *Arnold,* however, is more significant than this language indicated. In his plurality opinion, Judge Cox, in the face of a strenuous dissent by Chief Judge Everett, redefined the excited utterance exception to the hearsay rule,[27] and eliminated the requirement for a showing of constitutional unavailability in cases where the proponent of the hearsay statement of a nontestifying declarant offered it under that exception.[28]

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[14] *Id.*

[15] 24 M.J. 350 (C.M.A. 1987).

[16] *Id.* at 351.

[17] UCMJ art. 80 provides that "[a]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense."

[18] The Court of Military Appeals adopted the reasoning of United States v. Jackson, 560 F.2d 112, 116 (2d Cir.), *cert. denied,* 434 U.S. 941 (1977). *See also* United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied,* 419 U.S. 1114 (1975); Model Penal Code § 5.01 (1962).

[19] 24 M.J. at 352; *see also* United States v. Byrd, 24 M.J. 286, 289 (C.M.A. 1987). In *Byrd,* the accused had received money from an undercover agent and went with others to purchase marijuana. He never purchased the marijuana. The court concluded that Byrd's act was prepatory and too many steps remained before the distribution could be consummated. More importantly, *Byrd* will be remembered as the case in which the court recognized the defense of voluntary abandonment.

[20] United States v. Presto, 17 M.J. 1105, 1106 (A.C.M.R. 1984).

[21] *Id.* at 1107.

[22] *See* United States v. Presto, 24 M.J. at 352 n.3, where the court noted the discrepancy between the facts actually established at trial and the facts relied on by the Army court.

[23] The government was relying on the telephonic inquiries made by Presto as the act that constituted the attempted distribution. *Id.* at 351–52.

[24] In a concurring opinion, Judge Cox agreed that Presto's conduct never advanced beyond mere preparation. Judge Cox did, however, believe that these facts could sustain a conviction for conspiracy. *Id.* at 353.

[25] 25 M.J. 129 (C.M.A. 1987).

[26] *Id.* at 130.

[27] Mil. R. Evid. 803(2).

[28] Ohio v. Roberts, 448 U.S. 56 (1980).

The victim in *Arnold* was Arnold's thirteen-year-old daughter. She alleged that Arnold approached her in the kitchen of the family home and fondled her pubic area. Later the same evening he entered her bedroom and had her remove her underpants. Arnold apparently heard his wife coming out of the shower and departed. He returned later and attempted sexual intercourse. The next morning the victim approached her guidance counselor at school and asked to speak to him. When the counselor saw her approximately one and one-half hours later her first comment was "Is the father supposed to be the first one to have sex with you?"[29] This prompted questioning by the counselor and soon the full story was told. Subsequently, the victim repeated her allegations in the presence of the school nurse and gave a statement to a Criminal Investigation Division (CID) agent.

The counselor, nurse, and CID agent all testified as to these heresay statements over defense objection. The government made only an informal effort to locate the victim the morning of trial and she did not appear and testify. The counselor testified that the victim was normally very "bubbly" but on the day he spoke with her about the offense she was "very, very subdued."[30] These statements were introduced to corroborate Arnold's confession to the offense. The victim had recanted her statements prior to trial and Arnold recanted his confession during trial. The Army Court of Military Review held the statements to the nurse and CID agent inadmissible but found the statements to the counselor to be excited utterances under Mil. R. Evid. 803(2) and therefore admissible.[31]

Judge Cox found that the statement to the school counselor was an excited utterance even though it was made by a thirteen-year-old girl roughly twelve hours after the event and more than one hour after her initial contact with the counselor, and notwithstanding the fact that the counselor testified the victim was very, very subdued when his interrogation began. While the passage of time may not be dispositive of the issue of whether an utterance is excited,[32] Chief Judge Everett's observation that the alleged victim had ample opportunity to reflect, indicating that her statement to the counselor was not an excited utterance, is factually persuasive and was addressed by Judge Cox. Judge Cox observed that the " 'stress of excitement' can linger long after a traumatic episode and not manifest itself until the child is in the company of friends, confidants, teachers, ministers, or others they trust."[33] Judge Sullivan did not address the hearsay statements.[34]

The second aspect of this case worthy of note is Judge Cox's holding that, for purposes of the confrontation clause,[35] a showing of unavailability was not required. In finding the statement to the counselor reliable, Judge Cox reasoned that the excited utterance exception is "long-established" and "well-recognized" and that hearsay statements that fall within such an exception are so "inherently reliable" that they satisfy the constitutional right of confrontation.[36] Judge Cox did not require a showing that the witness was unavailable because of the Supreme Court's rationale in *United States v. Inadi.*[37] In *Inadi,* the Supreme Court held that the government need not always comply with the rule of necessity announced in *Ohio v. Roberts.*[38] In *Roberts,* the Court held that the government must first show unavailability after good-faith efforts to produce the declarant to have the hearsay statement of a nontestifying declarant admitted. *Inadi* created an exception to the requirement to demonstrate unavailability where the declarant was a co-conspirator and the statement was made in the course of or in furtherance of the conspiracy. The Court recognized in *Inadi* that such statements are particularly significant because of the context in which they are made and that there is no adequate substitute for them.[39] Although the Court held in *Ohio v. Roberts* that statements falling within a firmly rooted exception to the hearsay rule have adequate indicia of reliability to meet the second prong of the confrontation clause analysis,[40] the Court clearly stated that the government must first establish unavailability. *Inadi* did not change this requirement except for the situation where the hearsay statement was that of a co-conspirator. Judge Cox followed *Inadi* and did not require a showing of unavailability because the accused's confessions so corroborated the hearsay statement that in-court confrontation was not necessary.[41] Furthermore, the decision makes it clear that the court "favors confrontation," and that *Arnold* "should be real very narrowly."[42] Therefore, the suspension of the unavailability rule for all excited utterances is constitutionally suspect at best.

Defense counsel should anticipate that, based on *Arnold,* government counsel will now attempt to characterize almost every statement of a child as an excited utterance and offer the statement without a showing of constitutional unavailability. As always, defense counsel must meet this offer

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[29] 25 M.J. at 131.

[30] *Id.*

[31] United States v. Arnold, 18 M.J. 559 (A.C.M.R. 1984).

[32] United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980), *cert. denied,* 450 U.S. 1001 (1981).

[33] 25 M.J. at 133 n.4.

[34] Judge Sullivan did not pass on the issue of excited utterance. He would have affirmed based solely on Arnold's confession corroborated by the fact that Arnold was at his own home on the night of the incident. *Id.* at 134. (Judge Sullivan concurring in the result).

[35] U.S. Const. Amend. IV.

[36] 25 M.J. at 133.

[37] 475 U.S. 387 (1986).

[38] 448 U.S. 56 (1980).

[39] *See also* Bourjaily v. United States, 107 S. Ct. 2775 (1987) (Prong of *Ohio v. Roberts* requiring adequate indicia of reliability satisfied. The Court found the co-conspirator exception to be firmly rooted and statements offered under this exemption were reliable.).

[40] 448 U.S. at 66.

[41] 25 M.J. at 133.

[42] *Id.*

with objections based both on constitutional and evidentiary grounds. The offer should be challenged factually by demonstrating that the statement was not an excited utterance and legally by arguing that the *Arnold* decision must be read very narrowly[43] and that it constitutionally unsound. Captain Keith Sickendick.

What's the Big *Dill?* Confrontation Reaffirmed

In *United States v. Dill,*[44] the Court of Military Appeals addressed the frequent situation where the prosecution attempts to use the statement of an out-of-court declarant to prove an element of the crime.[45] Again, the court recognized the preeminence of an accused's right of confrontation under the sixth amendment unless adequate guarantees exist to satisfy the purpose of confrontation.[46] Specifically, the decision reaffirms that "the prerequisites for admissibility without such confrontation are (1) unavailability and (2) reliability."[47]

The decision in *Dill* is also significant because it lays to rest two evidentiary myths long held dear by prosecutors: statements against penal interest carry equivalent guarantees of reliability as other long-held exceptions to the hearsay rule;[48] and the government need never offer immunity to an otherwise available witness.[49] Briefly, Specialist Dill was accused of receiving stolen grenades and improperly disposing of them. Specialist Dill had confessed to receiving a number of the grenades from some of the original thieves. At his court-martial, he disputed that he received any grenades from an alleged coactor who had implicated Specialist Dill in a separate confession. After the coactor admitted that he had made the confession, he invoked his right to remain silent at Specialist Dill's court-martial. The defense opposed the government's submission of the coactor's sworn confession on the ground that no grant of immunity had been offerred the coactor. Trial counsel responded that immunity would interfere with subsequent prosecution of the coactor.[50]

In analyzing the confrontational value of statements against interest, the Court of Military Appeals affirmed the "special suspicion" in which post-arrest statements have been traditionally viewed—*i.e.,* as motivated by a desire to curry favor with the police or to shift blame.[51] The court readily dismissed the contention that this infirmity could be resolved by form alone, as statements against penal interest were not "firmly rooted" as exceptions to the hearsay rule, being of "recent derivation."[52] As for the duty of the government to exercise due diligence in acquiring the presence of its witnesses and making them available for cross-examination, the Court of Military Appeals adopted the fundamental fairness approach announced previously by the Air Force Court of Military Review.[53] "[I]t cannot be that an accused should be forced to surrender his constitutional rights in his own trial so the Government will be in a better position, in a later trial, against some other person."[54] Accordingly, the government must demonstrate extraordinary circumstances if it elects not to immunize its own witness but nonetheless attempts to submit his or her out-of-court declarations.[55]

Because neither prong of the test (reliability or unavailability) existed, the court found reversible error in admitting the co-actor's confession. The majority opinion in *Dill* did not directly address the use of "interlocking confessions"[56] to satisfy the confrontation clause, as there were material discrepancies between the confessions of Specialist Dill and

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[43] *Id.*

[44] 24 M.J. 386 (C.M.A. 1987).

[45] The Court of Military Appeals has recently addressed other attempts to admit out-of-court statements: United States v. Arnold, 25 M.J. 129 (C.M.A. 1987) (where 13-year-old daughter told her high school counselor about father's sexual assault the next morning, declaration constituted an excited utterance and was supported by father's confession); United States v. Dunlap, 25 M.J. 89 (C.M.A. 1987) (unavailable child's statement to criminal investigators was corroborated by excited utterance to baby-sitter; therefore, necessary indicia of reliability existed to satisfy accused's constitutional rights); United States v. Groves, 23 M.J. 374 (C.M.A. 1987) (putative wife held unavailable but her statement of family history to criminal investigators lacked sufficient reliability for admission); United States v. Barror, 23 M.J. 370 (C.M.A. 1987) (alleged victim was unavailable but his statement to investigators was not admissible under the residual hearsay exception as the record failed to establish adequate indicia of reliability); United States v. Hines, 23 M.J. 125 (C.M.A. 1986) (witnesses held to be unavailable and their statements to investigators were admitted in part where reliability was confirmed by accused's confession); United States v. Cokeley, 22 M.J. 225 (C.M.A. 1986) (use of alleged victim's videotaped deposition was improper where record was inadequate to establish unavailability of witness at some future date); United States v. Cordero, 22 M.J. 216 (C.M.A. 1986) (wife of the accused was unavailable but her statement to investigators lacked reliability); United States v. Deland, 22 M.J. 70 (C.M.A. 1986), *cert. denied,* 107 S. Ct. 196 (1986) (child victim's statements to psychiatrist were admissible under Mil. R. Evid. 803(4); confrontation was satisfied because victim testified at trial).

[46] *Dill,* 24 M.J. at 386 (citing United States v. Hines, 23 M.J. at 127).

[47] *Id.* (citing Ohio v. Roberts, 448 U.S. 56 (1980)).

[48] Reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception. Mattox v. United States, 156 U.S. 237 (1895).

[49] Under M.R.E. 804(a)(1), government counsel have argued that valid invocation of the privilege against self-incrimination by a co-actor makes that co-actor unavailable per se. *See* S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 676 (2d ed. 1986).

[50] The coactor was never prosecuted.

[51] 24 M.J. at 387 (citing Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986)). It is inconsistent to prohibit the use of a co-defendant's confession at a joint trial, but permit the use of the same confession directly against the other accused at a separate trial.

[52] *Id.* at 388 (citing McCormick on Evidence § 278 (E. Cleary 3d ed. 1984)).

[53] *Id.* at 389 (adopting United States v. Valente, 17 M.J. 1087, 1088–89 (A.F.C.M.R. 1984).

[54] *Id.* at 389.

[55] Practical difficulties abound in the prosecution of any immunized witness, but these alone should not constitute "extraordinary" reasons. *See generally* United States v. Garrett, 24 M.J. 413 (C.M.A. 1987); United States v. Zayas, 24 M.J. 132 (C.M.A. 1987); United States v. Gardner, 22 M.J. 28 (C.M.A. 1986).

[56] "Interlocking confessions" are generally described as confessions of different individuals that corroborate important details of each other and thereby logically interlock so that if one is true then the truth of the other can be reasonably inferred.

the coactor.[57] Nonetheless, the existence of truly corroborating admissions by coactors may prove to be adequate to satisfy a harmless error finding or to establish inherent reliability for admission under the so-called residual hearsay clauses.[58] The Court of Military Appeals does appear willing to consider "interlocking confessions" in an appropriate case under the residual hearsay clause of Military Rule of Evidence 803(24), which would obviate the unavailability prong of the test required by Rule 804(a).[59]

United States v. Dill provides the trial defense counsel with very effective authority to compel the granting of immunity to a coactor or force the government not to use the coactor's confession. A statement against interest is no longer an assured means of bypassing an accused's right to confrontation if reliability or fundamental fairness are missing. The accused's own confession will be carefully scrutinized by trial counsel and judge alike, however, to chart a course away from the holding in *Dill*. If the confession can be portrayed as identical in all material respects to the out-of-court declaration of the coactor, then the opportunity to cross-examine the coactor will predictably diminish in importance from the standpoint of constitutional scrutiny.[60] Major Marion E. Winter.

Ecoffey Waiver Applied to *Gregory* Credit

The Army Court of Military Review recently decided a case involving another issue potentially waived on appeal should defense counsel fail to raise it at trial. In *United States v. Howard*,[61] the military judge ruled that the accused was subjected to pretrial restriction tantamount to confinement for eight days, and directed credit be granted for the restriction.[62] On appeal, the Army Court of Military Review considered whether appellant was entitled to the additional day-for-day R.C.M. 305(k) credit he should have received pursuant to *United States v. Gregory*.[63]

First, the court noted that appellant had already served his approved five months of confinement, and had no forfeitures or fine adjudged. The court then opined that no remedy now existed under R.C.M. 305(k) for violations of that rule.[64] The court refused to otherwise provide relief, stating that appellant's bad-conduct discharge and reduction to private E–1 were entirely appropriate in his case and, pursuant to the court's authority under Article 66, UCMJ, his sentence "was correct in law and fact and should be affirmed."[65]

Second, the Army court reminded counsel that when *Mason* credit for more than seven days is requested, "the issue of *Gregory* credit is normally present as well and should be raised by counsel as soon as possible at the trial level."[66] Should *Gregory* credit not be raised at trial, the Army court cautioned that "waiver may be considered appropriate." For the waiver proposition, the court cited *United States v. Ecoffey*,[67] the case in which the court held that *Mason* credit would be waived if not raised at trial.[68]

United States v. Howard is a clear warning that some clients, due to the nature of their sentences, have no remedy on appeal for belatedly raising the issue of *Gregory* credit, and all clients are potential victims of waiver should defense counsel fail to raise the issue at trial. Captain Lida A. S. Savonarola.

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[57] 24 M.J. at 388 n.5. In his dissenting opinion, Judge Sullivan believed that the appellant's confession dictated affirming his conviction. *Id.* at 389 (Sullivan, J., dissenting) (citing Cruz v. New York, 107 S. Ct. 1714, 1719–22 (1987)).

[58] *Id.* at 388.

[59] *Id.*

[60] Harmless error remains a winning argument for the government in most appellate cases where an accused has made significant admissions against his own interests. *See* UCMJ art. 59(a).

[61] CM 8600903 (A.C.M.R. 6 Oct. 1987).

[62] *Id.* Apparently, the military judge only directed that *Mason* credit be granted. *See* United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

[63] 21 M.J. 952 (A.C.M.R. 1985), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition).

[64] United States v. Howard, slip op. at 2.

[65] *Id. See also* United States v. Butler, 23 M.J. 702, 705 (A.F.C.M.R. 1986), where the Air Force Court of Military Review similarly held that for an accused who had been subject to illegal pretrial confinement, but had been sentenced only to a bad-conduct discharge and reduction to E–1, no remedy was available under R.C.M. 305(k). The Air Force court, however, fashioned an equitable remedy by ordering that the convening authority ensure that Butler receive administrative credit toward his enlistment for time served in illegal pretrial confinement.

[66] United States v. Howard, slip op. at 2.

[67] 23 M.J. 629 (A.C.M.R. 1986).

[68] *Howard*, slip op. at 2–3.

The Child Sexual Abuse Case: Part II

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Introduction

Part I of this article, published in the November 1987 issue of *The Army Lawyer*, examined procedural considerations in child sex abuse cases and what improvements can and must be made in the "system." Part II will discuss several common, but complex, and often constitutionally confounding, evidentiary issues. During this discussion, let us keep in mind that the goals are to ascertain the truth, attain justice, and protect the rights of the parties, one of whom is the accused.

The fact patterns of these cases are somewhat similar, but the numerous permutations possible ensure that no two are exactly alike. Some principles, however, can be applied to most, if not all, of them.

For example, the accused will have either remained silent, or he will have made admissions, if not a complete confession. If his statements are incriminatory, he may either recant their truth or deny that was what he said or, if he did say it, claim that it was not voluntarily, or if it was voluntary, claim that it was not what he meant.

The victim, after providing statements averring the defendant's wrongdoing, may either fail to appear for the trial or, after appearing, may refuse to testify, or if she does testify, may recant and attempt to exculpate the accused.

By the time you add the factors of the mother and the interplay of siblings, social workers, and psychologists, it is easy to see why these cases require careful attention to the Military Rules of Evidence. These evidentiary issues require meticulous preparation, careful research,[1] and thoughtful application. These are not the kinds of cases you want to try a second time. Let us turn now to specifics.

Obtaining Pretrial Statements

In addition to their obvious utility as incriminating statements to establish the guilt of the accused, pretrial admissions or confessions may be essential for a less obvious reason. For example, even if the accused recants his pretrial statement, it can be used as corroboration to establish, under the residual hearsay exception,[2] the reliability of the statement of the victim who either recants or refuses to testify.[3]

Part I emphasized the importance of *thorough* investigative activity early in the case. This means the investigators must maintain a semblance of objectivity to determine all the facts. An investigator who concludes early on in the investigation that the subject is guilty and then sets out to establish only a prima facie case in order to close out the report of investigation (ROI) risks reversal of an otherwise valid conviction because the method of questioning could cause a statement to be inadmissible under a sixth amendment analysis. In *Hines*, the Court of Military Appeals examined the thoroughness of the victims' sworn statements. Finding that the investigator's efforts fell short of "bipartisanship" or "zealous" effort to also uncover the weaknesses of the case,[4] the court held that such statements were unreliable and thus inadmissible, violating the accused's constitutional right of confrontation. The statements were held to be insufficient to sustain a conviction except to the extent of actual corroboration. While stating that the court was "quite prepared to assume that law-enforcement officers are, as a group, highly reliable and professional," it also stated that "[o]n this record, . . . the investigative process was not equivalent to the judicial process."[5] The court then evaluated the accused's pretrial statements for corroborative evidence. To the extent his own statements admitted the specific offense alleged, the conviction was affirmed. The court reversed to the extent they did not.

Unavailability of the Child Victim Witness

As indicated in Part I, it is all too common for the child to become either unavailable, uncooperative, or untruthful with complete recantation by time of trial. There are various ways the prosecution can prove the case using "hearsay".[6] Of course, the applicable exception under the Military Rules of Evidence will depend upon when and to whom the statement was made.

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[1] The law on many of these issues is in a state of flux. Numerous cases are pending before the Court of Military Appeals, with petitions for review granted and due for decision on significant courts of military review opinions. Keep up to date on the law!

[2] Military Rules of Evidence 803(24) and 804(b)(5).

[3] *See, e.g.*, United States v. Hines, 23 M.J. 125, 137 (C.M.A. 1986); *see also* United States v. Barror, 23 M.J. 370 (C.M.A. 1987); Kearns, *The Recalcitrant Witness*, The Army Lawyer, Jan. 1987, at 30. In *Hines*, the court recognized the remedy of seeking to incarcerate a recalcitrant family member who fails in his or her "societal obligation" to testify. The court stated such would not be unthinkable "[f]or some offenses," but felt the judge was justified in this case for taking the witnesses at their word that they would "go to jail rather than testify." 23 M.J. at 133 & n.13.

[4] *Hines*, 23 M.J. at 137.

[5] *Id.* This examination of the circumstances under which the statement to law enforcement agents was obtained continued in United States v. Barror, 23 M.J. 370 (C.M.A. 1987).

[6] Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mil. R. Evid. 801(c).

Statements Made While a Deponent

The deposition[7] is the best, most efficient method of preserving the victim's testimony. The deposition may be offered into evidence at trial in the event the witness recants[8] or is then unavailable.[9] With the availability of either government or personal video equipment, there is no reason not to videotape the proceeding and every reason why you should. After the videotaped deposition is taken, a typed transcript should be prepared for convenience of the parties. Get the deposition done ASAP! Time is truly of the essence. You are racing against the pressures to recant or disappear.[10] In the absence of a deposition, the next best opportunity is presented at the Article 32[11] hearing.

Testimony at the Article 32 Investigation

Ensure that a verbatim record is prepared to preserve the Article 32 hearing testimony of the primary witnesses, either by audio or video tape, or both. The victim's testimony should be transcribed verbatim if it is intended to qualify as former testimony under Mil. R. Evid. 804(b)(1) if the witness fails to appear or refuses to testify. The transcribed verbatim testimony from the Article 32 hearing may also be used as substantive evidence under Mil. R. Evid. 801(d)(1)(A) as a prior inconsistent statement if the witness does appear, does testify, but recants.

The maxim "Haste makes waste" applies at the Article 32. A common practice is for a witness at the Article 32 to merely be asked to confirm the making of a prior sworn statement, which is then shown to and adopted by the witness to expedite the proceeding. The trial counsel, as government representative, should be alert to a defense counsel who does not develop the victim's testimony by cross-examination, but appears to only use the Article 32 hearing as a discovery tool. In such a case, it would be prudent to put the defense on notice, in writing prior to or on the record at the hearing, that the statement is intended by the government to be used under the residual hearsay rule if the witness becomes unavailable.[12] Such notice should prompt the defense to develop the testimony by cross-examination, If it does not, trial counsel then can argue that the defense waived the opportunity.[13]

Other Hearsay Statements of the Child Victim

Every case presents a myriad of opportunities for counsel to excel by the creative use of the many hearsay exceptions provided under Military Rules of Evidence 803 and 804. Hearsay is defined in Mil. R. Evid. 801(c) as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14]

Generally, the sixth amendment requires and the fact-finder wants "reliable" evidence. This usually means seeing and hearing witnesses, under oath, who have firsthand knowledge concerning the facts in issue, and the witness being tested by the "greatest legal engine ever invented for the discovery of truth"—cross-examination.[15] Confrontation allows the witness' demeanor to be judged as a factor affecting credibility.

These safeguards against "unreliable evidence" give way to allow hearsay, as an exception, for two reasons: it is inherently trustworthy without those safeguards; or necessity demands it, because the evidence is reliable and the declarant is not available. The exceptions under Rule 803(1)–(23) emphasize the first reason (inherent reliability), so the rules deem that the declarant's availability is immaterial. The exceptions under Rule 804, which are deemed somewhat less reliable than those under 803, emphasize the second reason (necessity). Thus, the 804 exceptions require a finding of the declarant's availability, in fact or law. This section will address the admissibility of out-of-court statements that fit the hearsay definition.

Excited Utterances

There are "three separate requirements for a statement to be admitted as an excited utterance: (1) the occurrence of a startling event; (2) a statement made in close chronological

[7] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 702 [hereinafter MCM, 1984].

[8] Mil. R. Evid. 801(d)(1)(A) provides that a witness' prior statement is not hearsay and may be received in evidence if the witness/declarant testifies at the trial inconsistent to the prior statement, which was given under oath subject to the penalty of perjury, as in a deposition, and is subject to cross-examination at trial upon the prior statement.

[9] Mil. R. Evid. 804(b)(1) permits, as an exception to the hearsay rule, former testimony as in a deposition, provided the declarant is not then available as a witness and the party against whom it is offered had an "opportunity and similar motive to develop the testimony" as by cross-examination.

[10] Counsel are reminded that if new information develops after the deposition, the deposition may not be admissible as the defense did not have a "similar motive to develop the testimony." Mil. R. Evid. 804(b)(1). Having a witness make several pretrial sworn statements also risks inconsistent sworn statements.

[11] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

[12] United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983), *petition denied*, 17 M.J. 433 (C.M.A. 1984), opined that the defense counsel's cross-examination at the Article 32 hearing was apparently conducted only as a discovery device and he did not have a "similar motive" to develop the testimony of the declarant at the Article 32 hearing as he would by cross-examination at trial. The court then held the victim's sworn statement inadmissible under the residual hearsay rule of Mil. R. Evid. 804(b)(5) because the absence of such cross-examination of the declarant victim concerning the prior statement did not provide the statement with the requisite "equivalent circumstantial guarantees of trustworthiness." While the *Thornton* decision was criticized, along with others, for its "restrictive interpretation . . . upon the residual hearsay rule," United States v. Hines, 18 M.J. 729, 735 (A.F.C.M.R. 1984), *aff'd in part, rev'd in part on other grounds*, 23 M.J. 125 (C.M.A. 1986), it is an issue that can be avoided by the suggested timely notice.

[13] *See* United States v. Moreno, 25 M.J. 525 (A.C.M.R. 1987) (right of confrontation accorded where accused was offered the opportunity to cross-examine deponent, but declined to do so).

[14] An out-of-court statement is admissible if it is offered not for its truth, but instead for another purpose. Many nonhearsay purposes exist for the use of out-of-court statements to prove something other than the truth of its contents. One example is knowledge of the witness: daughter, asked by mom why the dishes weren't done, replies "I couldn't; dad was teaching me the birds and the bees the hard way." Out-of-court statement? Yes. Hearsay? No, not offered to prove, *e.g.*, that the mother knew of the abuse. *See generally* S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 611–12 (2d ed. 1986).

[15] California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). The effectiveness of cross-examination is reversely proportional to its use. The more you elicit on cross, the less well is your client usually served. There is no more universally acknowledged premise that is so often ignored in its application.

proximity thereto; and (3) a material relationship between the statement and the circumstances of the case in which it is offered." [16]

In *United States v. LeMere*, the Court of Military Appeals addressed the first requirement to determine what effect, if any, the alleged event had upon three-and-a-half year old Christy. Pointing to the fact Christy had gone back upstairs with the accused, Larry, after the alleged event to look for her shoes, later fell asleep in his arms on the trip to take him home, and, the next day, did not seem upset when she told her mother what "Larry" had done, the court held that the requirement was not met. [17] Chief Judge Everett concluded that "the event must be viewed as 'startling' by the declarant [child], regardless of how it might appear to some other person." [18] While expressing the view that the "excited utterance" exception under Rule 803(2), might not require "spontaneity" (*i.e.*, a lack of questioning to prompt the declarations) as under the previous "spontaneous utterance" exception of paragraph 142*b*, Manual for Courts-Martial, United States, 1969 (Rev. ed.), Judge Everett opined that the excited utterance exception "cannot readily be applied to a situation where a child calmly answers questions . . . instead of emotionally volunteering information." [19]

In a recent Court of Military Appeals decision involving a child that was visibly upset the next day when she asked to speak with a school counsellor, the second requirement was held to be met despite at least twelve hours having passed from the event to the child's first statement. In *United States v. Arnold*, Judge Cox held that "the lapse of time between the startling event and the out-of-court statement although relevant is not dispositive in the application of Rule 803(2)." [20] Judge Cox emphasized repeatedly that the child's statement to the trusted adult school counselor was made at "*the first available opportunity* while she was 'very, very agitated,' " [21] and apparently analogized such hearsay statements to "fresh complaint" and "res gestae" exceptions of other jurisdictions that have "adapted their hearsay exceptions to accommodate the complaints of child victims." [22] Judge Cox noted how adolescents manifest in different ways the "stress of excitement" from a traumatic event—just like adults—with no prescribed manner. Some report it immediately, some delay reporting it, and some never report it at all. Nonetheless, "[s]ilence does not mean they were not traumatized." [23]

From the *Arnold* court we learn that a report made at the "first opportunity" may sufficiently rekindle the stress of the startling event so that "spontaneity" in the statement is apparent, which results in its admissibility as an excited utterance. But there are limits to this rekindled spontaneity. [24] If the school counsellor immediately calls in a school nurse and has the child recount the same previous night's events, the retelling will not be admissible as an excited utterance. As the court below pointed out, however, with a proper foundation, it might qualify under Rule 803(4) as a statement for medical diagnosis or treatment. [25]

A third telling, to law enforcement agents, even if written, sworn, and entirely consistent with the first telling or the second telling, will also not be admissible as an excited utterance because consistency will not supplant the requirement for spontaneity in the utterance. [26]

The second requirement of proving the time period between the startling event and the statement will also not have been met, logically enough, unless it is established when the event occurred. If counsel fails to "make a record," the statement will be inadmissible even if the statement is in fact an excited utterance. In *United States v. Keatts*, [27] the mother coaxed her "scared looking" seven-year-old daughter to tell her "what was going on yesterday" when she did not come home immediately, even after

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[16] United States v. LeMere, 16 M.J. 682, 687 (A.C.M.R. 1983), *aff'd*, 22 M.J. 61 (C.M.A. 1986) (citations omitted).

[17] 22 M.J. at 63.

[18] *Id.*, at 68. *See also* United States v. Ansley, 24 M.J. 926, 928 (A.C.M.R. 1987).

[19] *Id.* at 68. *But see* United States v. Keatts, 20 M.J. 960 (A.C.M.R. 1982), which expressed the view that "[t]hese requirements do not constitute a mechanical formula, but must be considered in the light and experience of the particular declarant." *Id.* at 962. If one were to analyze these requirements and apply them to Christy, the *LeMere* result might have been different. Despite Christy's lack of upset or "excitement" over what she said Larry had done, there was no hint of this three-year-old's having or acting upon a motive to lie or to "get Larry into trouble." Actually, it seems that Christy was sexually unaware. Therefore, her reporting of the event would not be seen by her as a means to exact revenge, even if she were so motivated. Sexually unaware children are a natural prey of child molesters, who often do their best to assure the victim that "it's O.K." (*See* United States v. DeJonge, 16 M.J. 974 (A.F.C.M.R. 1983), *petition denied*, 18 M.J. 92 (C.M.A. 1984), for an example of a natural father's efforts, from his daughter's 11th to 17th years, to convince her their regular intercourse was "O.K."). After such reassurance, it is not unusual for the child to participate in the acts and enjoy the increased attention. Emotional harm is often delayed until when the child becomes aware and recognizes the inherent betrayal by the adult of the child's trust. More often than not, the child feels guilty and experiences great loss of self-esteem. *See* A Mayer, Sexual Abuse: Causes, Consequences and Treatment of Incestuous and Pedophilic Acts (1985). That a child reports the events in a routine, matter-of-fact manner may add to its credibility and should not necessarily preclude admissibility when the overall circumstances indicate, in the light of normal human experience, the trustworthiness of the statement. This is especially so when there is no evidence it was the product of reflection, deliberation, or motive to fabricate.

[20] 25 M.J. 129, 132 (C.MA. 1987).

[21] *Id.* at 132 (emphasis in original). Chief Judge Everett, dissenting, differed substantially on the facts, finding the child's statement to be the product of the excitement engendered by the retelling of the events, instead of the events generating the excitement resulting in the utterance. Interestingly, and perhaps as a result of these crimes which, in the words of Judge Everett, "stir such deep feelings as these," *id.* at 135, no apparent deference was paid to the trial judge, who "saw and heard the witnesses"; or to the Army Court of Military Review, which is empowered to judge the facts as well as the law. *See* UCMJ art. 66(c).

[22] *Id.* at 133 n.3.

[23] *Id.* at 133 n.4.

[24] The right of confrontation continues to weigh heavily upon the Court of Military Appeals. While the court held that an "excited utterance" is so inherently reliable that it is admissible, the court also made it clear that the exception is a narrow one and that the court favors confrontation. *Id.* at 133.

[25] United States v. Arnold, 18 M.J. 559 n.1 (A.C.M.R. 1984).

[26] For admissibility of statements to law enforcements agents under other theories, see *infra* notes 38–53 and accompanying text.

[27] 20 M.J. 960 (A.C.M.R. 1985).

being told to do so a second time. After hearing initial denials of anything being wrong, then hearing that "he told me not to tell," the mother promised no spanking and asked, "Has he *ever* touched you on your vagina?" The reply, "Yes, with his fingers" was held inadmissible because no time period was established.

The time period may be too long, even if the excitement is rekindled in the victim. In *United States v. Whitney,*[28] The Air Force court held that a lapse of four days was too great, despite the event being recalled in the mind of the three-year-old when she heard her mother on the phone with "him" and announced that he had pulled his pants down and had her touch "his thing."

Similarly, in *United States v. Luckey,*[29] the mother asked her child "Has anybody ever messed with you?" after they had watched a television show dealing with child sexual abuse. The child responded, with an outburst of tears, "Yes, Daddy pulled down my panties and stuck his private in my butt." The Air Force Court of Military Review held that a lapse of sixteen days was not in "close chronological proximity" to the incident. Also, the statement was not a "spontaneous declaration," but instead was the result of the mother's questioning. The Air Force court, however, was not presented with an adequate basis in the record to support the trial judge's ruling. The judge made no findings of fact and the prosecutor made no argument as to the theory of admissibility because the trial judge summarily overruled the defense objection. Make a record!

The third requirement is, in effect, one of relevance between the content of the statement and the startling event it is supposed to be about. This condition precedent will not be satisfied as to a previous ("old") incident. Thus, while the statement "he [did it] last night" will be admissible to prove what he did last night, the additional remark of "and he did it before, too!" will not qualify as an excited utterance.[30]

Statements for Medical Diagnosis

The breadth of this exception[31] has yet to be determined, but it seems to be expanding in its applicability.

Statements made to a doctor for the purpose of medical (including mental) evaluation, diagnosis, and treatment are clearly admissible. The Court of Military Appeals examined this exception in *United States v. Deland,*[32] in which the child's statements to a child psychiatrist included not only what occurred, but who did it. Was the identity of the abuser pertinent to treatment of the child?

> "The premise of the rule is that a patient seeking diagnosis or treatment from a physician has an incentive to be truthful because he believes that by telling the truth he will facilitate the doctor's task. . . . Obviously, then, the patient must have some expectation of benefitting in this way when he makes the statement, if it is to be admitted as evidence [under this exception]."[33]

The doctor testified that the identity of the perpetrator was important for medical purposes in order to determine the cause and to treat the emotional problems, which treatment would vary depending upon who inflicted the abuse.

Because the evidence clearly showed that the child *knew* the doctor needed the information to *help* her, the court held it admissible, but emphasized three points. First, in this case, there was no confrontation issue because the child testified at trial. Second, such evidence should be received with great caution by the judge. "We will not condone . . . testimony of a psychiatrist whose examination . . . was more oriented to his testifying at trial than to medical diagnosis or treatment."[34] Third, the doctor should not be allowed to vouch for the credibility of the child by asserting, expressly or impliedly, that "he believes the statement made by his patient."[35]

United States v. Evans[36] applied *DeLand* and found insufficient evidence to show that the child psychiatrist's examination was oriented for diagnosis or treatment rather than trial preparation. Because there was no showing that the child made the statements with any expectation of medical benefit or treatment, the statements were inadmissible under Rule 803(4). The court also addressed the admissibility of a statement made to a nurse at the emergency room by the child. The child was asked how she got hurt, and she replied, "Daddy hurt me."[37] The court had no difficulty finding this admissible under Rule 803(4), even though the statements were made to a nurse.

Statements to Law Enforcement Agents

The admissibility of a statement to law enforcement personnel depends in part upon the relationship of the declarant to the accused. In *United States v. Cordero,*[38] the Court of Military Appeals held that a statement to law enforcement agents by the accused's wife, who previously abused the victim and was suspected of being involved in the child's death, was so untrustworthy that it was not admissible under the hearsay exception of Rule 804(b)(5), despite her unavailability at trial.

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[28] 18 M.J. 700 (A.F.C.M.R. 1984).

[29] ACM 25969 (A.F.C.M.R. 27 Aug. 1987).

[30] *See* United States v. Keatts, 20 M.J. 960 (A.C.M.R. 1985).

[31] Mil. R. Evid. 803(4) provides for the admissibility of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

[32] 22 M.J. 70 (C.M.A. 1986).

[33] *Id.* at 72–73.

[34] *Id.* at 75.

[35] *Id.*

[36] 23 M.J. 665 (A.C.M.R. 1986).

[37] *Id.* at 670.

[38] 22 M.J. 216 (C.M.A. 1986).

As it would do later in *United States v. Hines,*[39] the court in *Cordero* looked to the method of interrogation used by the investigator. It cast a critical eye upon a method of questioning in which the declarant chose among hypotheses suggested by the investigator.[40] Where the investigator incorporates his own theories of the case into the statement or paraphrases the words of the witness, "the statement obtained is in some respects the product of the investigator, rather than the purported declarant."[41] Therefore, only confrontation would suffice to establish reliability of this particular statement.

The admissibility of a statement to law enforcement personnel also depends upon the professionalism of the investigator who obtained it and the guidance received from trial counsel during the investigation.[42] The agent who investigates thoroughly and uses the force of that evidence to obtain a statement will probably see a different result than one who takes shortcuts and obtains a statement too early in the investigation merely through the force of the agent's personality or interrogation skills. Is a "bad" statement better than no statement? Perhaps, but not if it lessens the possibility of obtaining a later, admissible statement. As the court stated in *Cordero*:

> Investigators should be encouraged to take detailed statements from witnesses. These statements may be valuable during the investigation and later at trial to corroborate, impeach, or refresh recollection. However, in a case like this, a statement to an investigator cannot be used as a substitute for a live witness—even if the witness is unavailable.[43]

When introducing a statement made to a criminal investigator, trial counsel must introduce evidence explaining the circumstances surrounding the taking of the statement that demonstrates its reliability. In *United States v. Barror,*[44] the Court of Military Appeals emphasized the effect that such hearsay has upon an accused's constitutional right of confrontation. Because the court could not find sufficient evidence in the record to show the circumstances surrounding the agent's taking of the victim's statement to corroborate or confirm its accuracy, the court held its admission in evidence was a denial of confrontation. The court indicated that it wanted to know more about the dynamics of the interview process and the victim's state of mind at the time the statement was made so the court could assess the victim's candor and the accuracy of his statement.[45]

Barror should be viewed in a broad context as a reaffirmation that the court is unwilling to routinely allow statements of victims to law enforcement agents, even in child sex abuse cases. The mission is clear for prosecutors: provide a clear picture, through the agent's testimony and actions, that the interview of the child victim was done with investigative objectivity and completeness. Counsel must prove that the statement obtained is the child's recitation of the events, and not the agent's interpretation. Further, the government must prove that it is the full story, including the "good and the bad" for the prosecution case. Finally, the prosecutor must corroborate the statement by other independent evidence, as discussed below.

Likewise, the defense counsel should establish how the statement was taken. Do not fail to notice if the ten-year-old's statement reads more like an investigative summary than the child's own words. There is a difference between the child's observations, impressions, and recollections being accurately recorded as communicated by the child, and the agent's paraphrasing/summarizing the same. That the child concurs with the agent's words does not make them the child's words. The former should be admissible, but not the latter.

Even if such additional facts were presented by the investigator's testimony at trial, however, it seems unlikely that this would have assuaged the *Barror* court's concern. The court was concerned that at the time the statement was taken, the agent did not act in a "bipartisan" manner, meaning perhaps the court felt the agent's actions would be better described as ex parte and prosecution-oriented, instead of objective and impartial. The *Hines* decision expresses a duty of investigators to clear up any inconsistency found in a statement and not work to establish only a prima facie case.[46] Whether the investigative conclusion is supported by the evidence is determined using a probable cause standard.[47] Therefore, the investigation may be closed when sufficient evidence exists to establish that an offense has been committed and by whom. Therefore, an effort to clear up inconsistencies not deemed sufficient to detract from the probable cause standard is not usually made.[48]

While *Barror* seems to erect a near-insurmountable barrier to the admissibility of statements to criminal

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[39] 23 M.J. 125 (C.M.A. 1986).

[40] The testimony of the agent during effective defense cross-examination, established that he paraphrased the declarant's responses to his questions and that, at times, the statements represented his words, not the declarant's. 22 M.J. at 222.

[41] *Id.*

[42] When advising investigators to "ferret out the weaknesses" of the case, as required by United States v. Barror, 23 M.J. 370 (C.M.A. 1987), do not give the impression that they must harshly interrogate every purported victim. The inquiry must be thorough, but not necessarily the "third degree." A hesitancy by victims of sex crimes to report them has long been due to their perceived victimization by the system. Many reforms have been instituted, such as the Victim/Witness Assistance Program, Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, chap. 18 (1 July 1984). *Barror* should not be read as an invitation to regression.

[43] 22 M.J. at 223.

[44] 23 M.J. 370 (C.M.A. 1987).

[45] The proper and timely videotaping of the child's interview may be the most efficient way of proving the interview dynamics and method of questioning. A video replay may also be the most effective method of assessing the declarant's demeanor and candor. *See, e.g.,* United States v. Moreno, 25 M.J. 523 (A.C.M.R. 1987), which affirmed the admissibility of the victim's videotaped initial statement to a state child welfare official.

[46] *Hines,* 23 M.J. at 137.

[47] *See* Dep't of Army, Reg. No. 195–2, Criminal Investigation—Criminal Investigation Activities (30 Oct. 1985), for the standards applied in criminal investigations conducted by CID.

[48] One exception when the opposite side of the investigator's conclusion should be pursued to establish its nonexistence is in a death case that is determined to be a suicide. In such case, it is prudent to establish the death was both a suicide and, conversely, not a homicide or murder.

investigators, *United States v. Dunlap*[49] shows that, while confrontation concerns remain great, the Court of Military Appeals, given an adequate record, will uphold their admissibility. The trial counsel in *Dunlap* clearly established the unavailability of the child, who apparently had been spirited away by the mother, with assistance from the accused's parents, who hid her and, with other members of the accused's family, induced her to refuse to testify. To support the admissibility of the sworn statement to the Criminal Investigation Division (CID), stipulated to have been made under "normal CID procedures," the trial counsel called the child's babysitter as a witness. The babysitter described the child's appearance and demeanor when the child made the "excited utterances" concerning what her father had done. The court found that these utterances, along with the child's appearance and demeanor, indicated the reliability of the later, nearly identical statements to CID. Therefore, due primarily to this independent, corroborative evidence, the child's statement to CID was held reliable and admissible under the confrontation clause analysis of *Hines*.[50]

Before seeking to admit a statement to criminal investigators, counsel should remember several things. First, the residual hearsay exceptions should be looked to only as a last resort. Second, trial counsel must show that the statement bears "particularized guarantees of trustworthiness."[51] The defense counsel should establish whether the statement is the child's or resulted from the agent putting words in the child's mouth. The trial judge must proceed on a case-by-case basis, and should state on the record the special facts and circumstances that indicate the statement's reliability and justify its admissibility.[52] Finally, even though a statement is admissible under a hearsay exception or exemption, it may be inadmissible under confrontation clause analysis.[53]

Expert Testimony on "Child Sexual Abuse Syndrome" and Opinion on Credibility

In the same way that a rape victim's symptomatic behavior, "rape trauma syndrome," has been turned from a factor diminishing credibility into evidence to enhance credibility, if not to prove a lack of consent,[54] child sexual abuse prosecutions have been similarly advanced.[55] Many child sexual abuse cases are actually rape cases,[56] with the same assertions by the accused that the victim is not a victim but only a liar.

In *United States v. Snipes*,[57] the accused, charged with sodomy and indecent acts on his adopted daughter, defended by attacking the child's truthfulness. In addition to a child psychologist, who catalogued the child's behavioral problems, including lying, the defense called the child's natural mother, the accused's mother, and a neighbor, all of whom generally testified by opinion or reputation evidence that the child was among other things, a liar. In rebuttal, the prosecution called family members who testified that the child was truthful and several expert witnesses. The experts testified about sexually abused children's behavior patterns in general, and the victim's behavior in particular. The Court of Military Appeals affirmed the conviction, holding:

> In cases of child abuse or incest, the knowledge of even a very experienced trial judge may be limited as to the psyche of the child victim, and expert testimony . . . can help the fact-finder in evaluating the behavior of the child, particularly when the contrary allegation is that she lied about the incidents or made them up in retaliation for some family difficulty.[58]

The value of such expert testimony cannot be overstated. The defense thrust is often "This kid's behavior problems are so great, it causes her to lie about everything, and I'm on trial for just trying to make her behave." The expert can turn this purported cause around and show that the child's behavior is really the effect. The child has become a problem because of the sexual abuse, which put the child into an adult-type relationship, causing tremendous stress in the child to keep a foot in both an adult and a child camp. Soon, the stress is manifested in a decline in school performance, truancy, aggressive behavior, defiance against "childish" family rules, lying, and promiscuity. Frequently,

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[49] 25 M.J. 89 (C.M.A. 1987).

[50] *Hines*, 23 M.J. at 137–38 & n.16. The factors indicating reliability of the statement to CID in *Dunlap* included: the near identity between the "presumptively reliable" excited utterance to the babysitter and the statement to CID; the close proximity in time between the two statements; the child's appearance and demeanor; the statement to CID being first reviewed and then signed under oath by the declarant; and "normal CID procedures" employed in obtaining the statement. *Dunlap*, 25 M.J. at 91.

[51] *Hines*, 23 M.J. at 134.

[52] *Id.* at 135, *See* U.S. v. Moreno, 25 M.J. 523, 527 n.6 (A.C.M.R. 1987), for an example of the special findings required of the trial judge in admitting such "residual hearsay" statements. *See generally* Child, *Effective Use of Residual Hearsay*, The Army Lawyer, July 1985, at 24, for an overview and analysis of the cases in this area. More recent case law must also be considered. *See also* Ross, *Residual Hearsay: A Critical Examination and a Proposal for Military Courts*, 118 Mil. L. Rev. 31 (1987).

[53] The sixth amendment requires that before hearsay is admissible, the prosecution must demonstrate that the declarant is unavailable and that the statement is reliable. *See* Bourjailly v. United States, 107 S. Ct. 2775 (1987). Unavailability is required even though a statement is offered under Mil. R. Evid. 803(24). *Hines*, 23 M.J. at 129.

[54] *See generally* Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 Mil. L. Rev. 121 (1987). These rape trauma symptoms include fear, guilt, anger, embarrassment, excessive motor activity (hyperactivity), nightmares, and phobic reaction. *Id.* at 130 n.58. These symptoms manifest themselves in the victim recanting, denying the event occurred, and suffering real or feigned memory lapses. This pattern is frequently observed in the child sexual abuse cases, as well.

[55] Taken too far, however, expert testimony concerning "rape trauma syndrome," even though relevant, will run afoul of Mil. R. Evid. 403. United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985).

[56] It must be remembered that child sexual abuse is no less than a criminal assault. Incest with a child of "tender age," even if only through the child's acquiescence, is still rape. The lack of consent necessary to prove rape can be established showing long term mental and physical duress and the "compulsion of parental command." *See* United States v. DeJonge, 16 M.J. 974 (A.F.C.M.R. 1983), *petition denied*, 18 M.J. 92 (C.M.A. 1984). Too often what is actually rape is erroneously charged or prosecuted as carnal knowledge, an anachronistic euphemism in many incest cases.

[57] 18 M.J. 172 (C.M.A. 1984).

[58] *Id.* at 178.

the abusing parent exhibits his own subtle changes in behavior, including a heightened sense of jealousy toward the child's friends, especially "boyfriends," and setting more limits on the child's activities, which causes more defiance.[59]

While an expert may testify as to adolescent behavior and the effects of child sexual abuse on such behavior, an expert witness will not be allowed to express an opinion as to the credibility of another witness, including the complainant. In *United States v. Petersen,*[60] the Court of Military Appeals apparently had no hesitancy in permitting an expert to testify as to the child's behavior pattern and that it was consistent with that displayed by children who have been sexually abused. The court, however, held that an expert's opinion as to whether the child was telling the truth concerning the charges was inadmissible.

There are other ways to use expert testimony to bolster the prosecution case. In *United States v. Little,*[61] the accused denied the acts alleged and claimed a lack of sexual interest in children. In rebuttal, the prosecution presented expert testimony[62] to distinguish between the pedophile, whose basic sexual orientation or preference is toward children, and a regressed offender, whose interest in children is a result of stress or other transient factors affecting his response and that the regressed offender may be motivated by a need to dominate a weaker person, as opposed to only seeking sexual gratification.[63] Additionally, the expert testified that the patterns of the accused's life and lifestyle were consistent with a regressed offender. The court held that this testimony was admissible.

Conclusion

Parts I and II of this article have touched the surface of the many issues and problems inherent in the prosecution and defense of child sexual abuse cases. With the tremendous increase in the number of reported instances of abuse and the greater willingness to prosecute them, the justice system must strive to improve. These cases demand prompt resolution, without inflicting more trauma upon our youngest citizens in the process. As in other matters, however, the ends of justice do not justify any means that would represent an abrogation of the right to a fair and impartial trial, in accordance with the law.

[59] *See generally* Finkelhor, Sexually Victimized Children (1979); National Center on Child Abuse and Neglect, Sexual Abuse of Children: Selected Readings, (1980).

[60] 24 M.J. 283 (C.M.A. 1987). The court expressed skepticism as to whether one witness could ever opine on the credibility of another, but alluded to its recent decision in United States v. Gipson, 24 M.J. 246 (C.M.A. 246), concerning polygraphs, which held that, with a proper foundation, such evidence may be admissible. The court pointed out, however, that despite being qualified as an expert in the area of child sexual abuse, no foundation was laid to establish expertise in determining credibility of child sexual abuse victims. Further, the court noted that while behavioral factors observed in child sexual abuse victims were presented, they were not connected or linked to the issue of credibility. Finally, the court pointed out that this was not a case in which there was an issue as to whether the child did or did not have the capacity or ability to grasp or comprehend the truth. Therefore, the opinion on credibility was erroneously received and the conviction was reversed.

[61] ACM 25858 (A.F.C.M.R. 23 July 1987).

[62] The defense objected to this testimony because the expert, a social worker who was the post Family Advocacy Officer, was not a medical doctor, psychologist, or sociologist. The Air Force court upheld the trial judge's overruling of this objection, finding no abuse of discretion in recognizing the witness as an expert due to his extensive training and experience in the field of social work in general, and child abuse in particular. Likewise, objections under Mil. R. Evid. 403 and 404(a) were similarly overruled and upheld.

[63] *See* Part I of this article, notes 37–38, for further definitions of pedophilia and regressed offenders.

Clerk of Court Note

Typographic Quality of Records of Trial

To clarify and amplify the observations published in Clerk of Court Notes in the August 1986 and August 1987 issues of *The Army Lawyer* concerning the readability of records of trial, the U.S. Army Court of Military Review has adopted the following statement:

> When a record of trial must include a verbatim transcript, the transcript must be printed on one side only of standard letter-size white paper. The type font must be Pica, Courier 10, or similar typeface with no more than ten characters per inch and in which each letter of the alphabet is clearly distinguishable from all others ("i" from "l", for example). The type used must produce a clear, solid black imprint of the kind normally produced by a typewriter, impact printer, or laser printer.

As of this writing, the court has not noted a verbatim transcript produced with a dot-matrix printer that meets these standards of readability. With respect to the procurement of laser printers, attention is invited to the information paper (DAJA–IM), subject: "Laser Printers," dated 2 October 1987, with attached guidance, that was distributed at the automation display at the 1987 Judge Advocate General's Conference.

We realize that court-martial jurisdictions that do not have access to a typewriter or printer capable of meeting the readability standards must continue to use the equipment on hand temporarily. Those jurisdictions must, however, give attention to producing the best print quality of print possible to ameliorate the readability problem being experienced by the court.

Regulatory Law Office Note

In the August 1986 Issue of *The Army Lawyer*, at 69–70, we noted that on 6 June 1986, the Regulatory Law Office, under a Delegation of Authority from General Services Administration, filed petitions in various jurisdictions requesting that the respective regulatory commissions consider investigating whether all rates of the various Bell telephone companies should be reduced in view of current favorable economic conditions.

Petitions were filed in Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Washington.

In nine states, Alabama, Delaware, Idaho, Indiana, Michigan, Nevada, Pennsylvania, Tennessee, and Washington, a total of $209 million in rate reductions resulted following the filing of the petitions. There are three states, Delaware, Massachusetts, and Minnesota, in which proceedings are still pending and there may be further reductions ordered. In the remaining jurisdictions, the petitions were denied or no action was taken. Government agencies shared proportionately in the overall reductions, estimated at 1 percent.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Note

Entitlements in Connection With Disciplinary Action

The Per Diem, Travel, and Transportation Allowances Committee recently implemented several changes to the Joint Federal Travel Regulation (JFTR). The provisions were effective on 1 September 1987, and the Army's implementing guidance was released to the field on 20 October 1987. *See* Dep't of the Army Message 201956Z Oct 87, subject: Entitlements in Connection With Disciplinary Action in CONUS. The new provisions authorize family member travel and household goods shipment for CONUS soldiers who are confined for more than 30 days, discharged, or dismissed from the service incident to a court-martial sentence. The same entitlements are authorized for family members of soldiers who receive an administrative discharge Under Other Than Honorable Conditions. Previously, such authority existed only for OCONUS soldiers.

Under the new rules, only soldiers whose court-martial sentences are approved by the convening authority pursuant to 10 U.S.C. § 860 on or after 1 September 1987 are eligible. Likewise, soldiers who are discharged or separated on or after 1 September 1987 are eligible.

A request for family member travel or shipment of household goods may be initiated by the soldier, the soldier's spouse, or other dependent, and will be forwarded to the Installation Order Issuing Authority (IOIA), *i.e.*, personnel service center/company, formerly the MILPO. Because family members can initiate the request for entitlements, the soldier cannot deny the family these benefits when the family testifies against the soldier. The victim/witness liaison should assist family victims/witnesses in obtaining travel and household goods shipment. The IOIA will determine if providing these entitlements is in the best interests of the soldier, his family, and the U.S. Government.

The IOIA is also charged with ensuring that a reasonable relationship exists between the conditions and circumstances in each case and the destination to which family member travel and household goods shipment are authorized. Family member travel allowances may not exceed the allowances from the place to which the family members were last transported at government expense. Transportation of household goods is authorized from the place to which last transported at government expense. In both instances, the place to which family members or household goods may be sent must be a designated place in the United States, Puerto Rico, or any territory or possession of the United States. Captain Bell.

 *U.S. G.P.O. 1987-201-420:80089

Contract Law Note

Descriptive Literature and Its Effect on Bid Responsiveness

The Comptroller General recently addressed and clarified an issue regarding bid responsiveness and qualifications of price. The issue arose in a bid protest over a solicitation for spectrum analyzers. Pursuant to the standard solicitation clause covering the submission of descriptive literature,[1] a bidder submitted its standard commercial literature for spectrum analyzers. The bidder's literature contained the preprinted words "prices and data subject to change." A competitor protested to the GAO that this language in the bid made it nonresponsive because the bid price was no longer fixed and definite. Imagine the protestor's surprise when the GAO ruled otherwise![2]

Before analyzing this case further, it may be helpful to discuss some of the basic rules concerning bid responsiveness and descriptive literature. Everyone knows that "to be considered for award, a bid must comply in all material respects with the invitation for bids."[3] Any bid that fails to conform to the essential requirements of the invitation for bids (IFB) must therefore be rejected as nonresponsive. The theory behind this rule is that it protects the integrity of the sealed bidding system and forces the government to consider all bids on an equal basis.

Price has always been an "essential requirement."[4] Sealed bidding calls for the submission of definite, fixed prices so that the government can determine who the low bidder is. Qualifying a bid price, therefore, has traditionally been held to make the bid unresponsive, because without a clear and definite intent on the bidder's part to be bound by its submitted price, there is no "meeting of the minds" between the government and the bidder.[5]

Descriptive literature is sometimes required to be submitted with bids when the government needs the information to evaluate the technical acceptability of the offered product and the information will not be otherwise available.[6] When the solicitation does *not* require descriptive literature but the bidder submits some anyway, the general rule is that it should be disregarded unless it is clear that the bidder intended to qualify its bid with it.[7] The theory here is that the government does not need to establish exactly what the bidder is proposing to furnish, and therefore does not need the descriptive literature to evaluate the bids. Thus an ambiguous qualifying statement on the descriptive literature should not be interpreted to mean that the bidder is not agreeing to meet the solicitation's specifications, unless of course it is clear that that is the bidder's intent.

When the solicitation requires descriptive literature, however, the information supplied *is* used to determine whether the bidder's proposed product complies with the solicitation's specifications. Should a preprinted statement on the literature that "prices and data are subject to change" affect the bid's responsiveness? In the case in question, the Comptroller General said it should not, but instead should be interpreted in the same manner as unsolicited descriptive literature. The statement itself had nothing to do with the purpose for which the descriptive literature was solicited in the first place: to help the government determine whether the bidder's spectrum analyzers conformed to the solicitation's requirements. Therefore, it should be ignored unless the bidder, by including the statement, *clearly* intended to qualify its bid. The Comptroller General concluded that, by itself, the preprinted statement could not be reasonably regarded as qualifying the bid price.

Does this mean that the contract attorney should now ignore all qualifications of price? Certainly not. If the qualification is included on the bid itself, or in a cover letter to the bid, *or* appears to have been consciously placed on any of the bid documents (including the solicited or unsolicited descriptive literature), then the bid ought to be declared to be nonresponsive. Preprinted statements, on the other hand, can, without additional supporting facts, safely be ignored.

One final note: in the case in question, why was that portion of the preprinted statement concerning "data" not deemed to have qualified the bid? Maybe because the Comptroller General missed it, but probably because once it determined that the "price" portion of the statement was not intended to qualify the bid, it had to come to the same conclusion as to the "data" portion. At any rate, a somewhat confusing area of the law regarding responsiveness and descriptive literature seems now to have a clear rule that can be applied in future cases. Major McCann.

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[1] Federal Acquisition Reg. § 52.214–21, "Descriptive Literature" (1 Apr. 1984) [hereinafter FAR].

[2] Comp. Gen. Dec. B–227800 (29 Sept. 1987), 87–2 CPD ¶ 315.

[3] FAR § 14.301(a).

[4] Comp. Gen. Dec. B–182604 (10 Jan. 1975), 75–1 CPD ¶ 13.

[5] *Id.*

[6] FAR § 14.201–6(p)(1).

[7] 53 Comp. Gen. 499 (1974); Comp. Gen. Dec. B–211968 (4 Oct. 1983), 83–2 CPD ¶ 416.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Consumer Law Notes

FTC Requests Help in Ending Marketing Fraud

In August 1987, Barbara Schanker, a Federal Trade Commission (FTC) consumer protection specialist, sent a letter to all legal assistance offices requesting information regarding a company that used misrepresentations and harassing phone calls to sell encyclopedias and other reference books. Ms. Schanker was pleased to receive more than twenty responses and would appreciate any additional information on the firm referenced in her letter or on other firms engaging in telemarketing or other fraudulent schemes.

Legal assistance attorneys are encouraged to mention such scams in post publications and during preventive law training, and to solicit information regarding such activities from those who have been victimized. Ms. Schanker can be reached at: Federal Trade Commission, Atlanta Regional Office, Room 1000, 1718 Peachtree Street, N.W., Atlanta, Georgia 30367, phone (404) 347–4836.

Computerized Tracking of Fraudulent Schemes

Telemarketing fraud is often difficult to investigate and prosecute because the perpetrators complete the scam and move on before law enforcement authorities, including the FTC, can act on leads. In an effort to identify illegal activities and potential witnesses more quickly, the FTC has developed a computerized system designed to record and assimilate data on such scams furnished by state attorneys general and other state and federal enforcement agencies. Legal assistance attorneys can assist the enforcement effort by collecting information regarding marketing scams and providing it to these enforcement agencies.

Further Regulation of Credit Services Organizations

Following the lead taken by Oklahoma,[8] three states have recently passed statutes regulating those who: provide services to improve buyers' credit records, ratings, or histories; assist in obtaining extensions of credit for buyers; or advise or assist buyers in such efforts.

All three state's laws (Louisiana,[9] Texas,[10] and Massachusetts[11]) require that subscribing consumers be given information statements describing the services to be performed and the total cost of the services. Additionally, the laws identify prohibited conduct by credit services organizations and specify the form of the written contract that must be executed for such services. According to the new laws, all contracts must include specific notice of cancellation (the Texas and Massachusetts laws permit buyers to cancel contracts within three days after execution and the Louisiana statute allows buyers five days). Violations of the Texas and Massachusetts laws constitute deceptive trade practices under the respective state's consumer protection statute. Major Hayn.

Testamentary Gifts to Minors

This note was prepared by Major Derek Smith, USAR, whose civilian practice emphasizes estate planning and wills.

The opportunity to make testamentary gifts to minors without the expense and administrative burden of establishing a guardianship or trust is available to an increasing number of clients. Several states have recently enacted the Uniform Transfers to Minors Act (UTMA), which authorizes transfers under both wills and trusts to custodians for beneficiaries under age twenty-one. Twenty-four states, as well as the District of Columbia and Guam, have now adopted the UTMA.

Although testamentary gifts were not authorized in the original Uniform Gifts to Minors Act (UGMA) or the Revised UGMA, a majority of states that retain those statutes have modified the provisions to permit gifts by will. A total of forty-one states now authorize testamentary gifts to minors through the use of custodial accounts. The following list identifies which Uniform Act has been adopted in each jurisdiction and notes whether testamentary gifts are permitted under the state's Act.

Alabama—UTMA; provides for testamentary gifts.

Alaska—Revised UGMA; does not provide for testamentary gifts.

Arizona—Revised UGMA; does not provide for testamentary gifts.

Arkansas—UTMA; provides for testamentary gifts.

California—UTMA; provides for testamentary gifts.

Colorado—UTMA; provides for testamentary gifts.

Connecticut—Revised UGMA; provides for testamentary gifts.

Delaware—Revised UGMA; provides for testamentary gifts.

District of Columbia—UTMA; provides for testamentary gifts.

Florida—UTMA; provides for testamentary gifts.

Georgia—Revised UGMA; does not provide for testamentary gifts.

Guam—UTMA; provides for testamentary gifts.

Hawaii—UTMA; provides for testamentary gifts.

Idaho—UTMA; provides for testamentary gifts.

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[8] *See* Note, *Restrictions on Credit Services Organizations,* The Army Lawyer, Aug. 1987, at 61.

[9] La. Rev. Stat. Ann. § 3575 (West 1987) (effective Sept. 1, 1987).

[10] Tex. Bus. & Com. Code Ann. §§ 18.10—18.15 (Vernon 1987) (effective Sept. 1, 1987).

[11] Mass. Gen. Laws Ann. ch. 327 (West 1987) (effective Oct. 21, 1987).

Illinois—UTMA; provides for testamentary gifts.

Indiana—Revised UGMA; provides for testamentary gifts.

Iowa—UTMA; provides for testamentary gifts.

Kansas—UTMA; provides for testamentary gifts.

Kentucky—UTMA; provides for testamentary gifts.

Louisiana—UGMA; provides for testamentary gifts.

Maine—Revised UGMA; provides for testamentary gifts.

Maryland—Revised UGMA; provides for testamentary gifts.

Massachusetts—UTMA; provides for testamentary gifts.

Michigan—UGMA; does not provide for testamentary gifts.

Minnesota—UTMA; provides for testamentary gifts.

Mississippi—Revised UGMA; does not provide for testamentary gifts.

Missouri—UTMA; provides for testamentary gifts.

Montana—UTMA; provides for testamentary gifts.

Nebraska—Revised UGMA; does not provide for testamentary gifts.

Nevada—UTMA; provides for testamentary gifts.

New Hampshire—UTMA; provides for testamentary gifts.

New Jersey—Revised UGMA; provides for testamentary gifts.

New Mexico—Revised UGMA; does not provide for testamentary gifts.

New York—Revised UGMA; provides for testamentary gifts.

North Carolina—UGMA; provides for testamentary gifts.

North Dakota—UTMA; provides for testamentary gifts.

Ohio—UTMA; provides for testamentary gifts.

Oklahoma—UTMA; provides for testamentary gifts.

Oregon—UTMA; provides for testamentary gifts.

Pennsylvania—Revised UGMA; provides for testamentary gifts.

Rhode Island—UTMA; provides for testamentary gifts.

South Carolina—Revised UGMA; provides for testamentary gifts.

South Dakota—UTMA; provides for testamentary gifts.

Tennessee—Revised UGMA; provides for testamentary gifts.

Texas—Revised UGMA; provides for testamentary gifts.

Utah—UGMA; provides for testamentary gifts.

Vermont—Revised UGMA; does not provide for testamentary gifts.

Virgin Islands—UGMA; does not provide for testamentary gifts.

Virginia—Revised UGMA; provides for testamentary gifts.

Washington—Revised UGMA; provides for testamentary gifts.

West Virginia—UTMA; provides for testamentary gifts.

Wisconsin—Revised UGMA; provides for testamentary gifts.

Wyoming—Revised UGMA; does not provide for testamentary gifts.

For further discussion of the use of custodial accounts in testamentary planning and suggested language to include in wills and trust agreements, see Note, *Testamentary Gifts to Minors*, The Army Lawyer, Jan. 1987, at 39.

Tax Notes

IRS Rules Payments From Military Retired Pay Not Includible in Gross Income of Payor

The Internal Revenue Service (IRS) was recently asked to rule on whether payments to a former spouse made from military retired pay should be included in the payor's taxable income (Priv. Ltr. Rul. 8734024 (May 22, 1987)).

When the parties received a divorce in a community property state in 1982, military retired pay was considered the separate property of the husband by the court. Several years later, however, the wife received a modification of the settlement agreement because of changes made by the Uniformed Services Former Spouses' Protection Act (USFSPA) (Pub. L. No. 97-252 (1982) (codified in scattered sections of 10 U.S.C.)). Under this Act, a court may treat disposable retirement pay as property solely of the member or as property of the member and his spouse in accordance with the law of the state having jurisdiction over the member (10 U.S.C. § 1408 (1982)).

The parties' modified settlement agreement required that the husband pay his ex-wife $400 per month from his military pension. The retired member thereafter sought a ruling from the service as to whether to include the amount paid to his former spouse from his military pension in his taxable income.

The IRS determined that the former spouse had a community property interest in the other spouse's vested military pension under the law of the state where the divorce was obtained. Because state law determines the character of interests and rights in property, the IRS found that the property division awarding the former spouse an interest in the military pension was a nontaxable division of co-owner property. Accordingly, the IRS ruled that the share of military retirement pension paid by the retired member to his former spouse was not includible in his taxable income but was includible in the gross income of the recipient.

Attorneys should exercise caution when advising divorcing couples in this area because, by statute, private letter rulings apply only to parties involved and may not be used or cited as precedent by others (I.R.C. § 6110(j)93) (West Supp. 1987)). In addition, although this IRS ruling is consistent with an earlier private letter ruling issued under similar facts (Priv. Ltr. Rul. 8431030 (May 1, 1984)), both rulings involve property divisions of military retired pay in community property states; the IRS has not yet ruled on the income tax consequences of payments from a military retirement pension to a former spouse in a non-community property state.

In Private Letter Ruling 8732024, the IRS also addressed the issue of whether income tax should be withheld on the gross amount of retired pay even though a nontaxable amount is paid directly to a former spouse pursuant to court order. Under Treasury Department Regulations, any amount deducted by an employer from the remuneration of an employee is considered remuneration to the employee at the time of the deduction even though the payment is to go to another party (Treas. Reg. § 31.3401(a)–1(b)(5)). Accordingly, the IRS ruled that the Department of Defense should withhold income taxes on the entire amount of military retirement pay, including the amount of court-ordered direct payments to the former spouse. Captain Ingold.

IRS Clarifies Who Must File Home Mortgage Interest Form

In a previous note in this column, readers were advised that the IRS released a draft version of Form 8598, *Computation of Deductible Home Mortgage Interest,* which taxpayers must use to determine the amount of deductible interest on home mortgage loans (Note, *IRS Releases Proposed Drafts of New Tax Forms,* The Army Lawyer, Oct. 1987 at 59). The IRS has recently released the final proof of Form 8598 and clarified who must file the form.

Form 8598, which has been retitled, "Home Mortgage Interest," has been issued to implement changes in the home mortgage interest deduction under the 1986 Tax Reform Act. Under the new law, qualified home mortgage interest is still deductible. An important limitation applies, however, if the home mortgage loan was incurred after 16 August 1986. Qualified home mortgage interest does not include interest on mortgage debts incurred after this date to the extent the debt exceeds the taxpayer's basis in the residence (including the cost of improvements to the home) plus certain qualified medical and educational expenses (I.R.C. § 163, as amended by 1986 Act § 511).

The instructions to Form 8598 indicate that the form need not be filed under three circumstances: if the only mortgage debt is the mortgage taken to purchase the home; if no new amounts have been borrowed against the home after 16 August 1986; or if the price paid for the home plus the cost of improvements is more than the total of the mortgage debt at all times in 1987. Under all three of these circumstances, the entire amount of home mortgage interest paid during the tax year is deductible.

There are still a number of homeowners who will be required to file Form 8598. For example, taxpayers who have refinanced a home after 16 August 1986 for a purpose other than home improvements, such as to pay educational expenses for a dependent, will be required to file the new form. Legal assistance attorneys should therefore order these forms and be prepared to assist clients complete them during the 1988 tax season. Captain Ingold.

Claims Report

United States Army Claims Service

Claims Training Philosophy

Colonel Jack F. Lane, Jr.
Commander, U.S. Army Claims Service

For several years the U.S. Army Claims Service (USARCS) has conducted a variety of claims training workshops at Charlottesville and other CONUS locations. These workshops focus on the practical aspects of claims, providing varying degrees of hands-on training, and were instituted to meet a need not covered by the Army's formal schools program. As many claims offices depend upon civilian and enlisted claims adjudicators and investigators to accomplish their claims mission, and only minimal training is provided to the enlisted force, USARCS believes that formal training to supplement OJT is essential to the development of a strong claims processing team.

After several years of experience, USARCS has conducted a review of its workshops and developed a Claims Training Philosophy. This philosophy will serve several purposes. First, it will provide USARCS with a proper framework for preparing instructional material. Second, it will provide the heads of field claims offices with guidelines for selecting the proper personnel to attend the various workshops. Finally, it will provide the attendees with a basic concept of the workshop's training objectives so that they can achieve the maximum benefit from the training provided.

The Claims Training Philosophy has one basic tenet: to provide practical instruction geared to the experience level

of the student. It is also important to recognize the nature of different claims offices. In larger offices, an individual may have responsibility for only one facet of claims operations, *e.g.*, personnel claims adjudication, tort claims investigation, or affirmative claims processing. In smaller offices, one person may handle several of these operations. Thus, training should be flexible enough to provide the most benefit to the greatest number of students.

To meet this goal, USARCS has developed a three-tiered training program similar to the NCOES program of basic, advanced, and sergeant major level courses.

The first tier is the Basic Claims Workshop, formerly referred to as the "regional claims training workshop" (see the Appendix). The main purpose of this workshop will be hands-on training in personnel claims adjudication and recovery, which will be accomplished through three three-hour sessions in which six dummy files will be processed. This will be supplemented with elective seminars in claims administration, affirmative claims, tort claims, and specific problems in personnel claims. These seminars will accommodate both the individual with personnel claims responsibilities only and the individual with multiple responsibilities. This workshop will run for two-and-a-half days and be presented twice a year, once in the eastern United States and once in the west. Attendance at this workshop will be limited to civilian non-attorney and enlisted claims personnel who have four years or less of claims experience; this limitation may be waived in a meritorious situation, *e.g.*, for an individual moving into personnel claims work from another section of a claims office. No individual should attend more than two basic course presentations; whether this will be in two consecutive years or in alternate years will be at the discretion of the sending claims office.

The second tier is the Advanced Claims Workshop, which is being developed for the first time in FY88 (see the Appendix). This workshop will provide a forum for senior non-attorney claims personnel to discuss claims issues with the USARCS policy-makers and to hone their claims skills. This will be accomplished through workgroup discussions on personnel claims adjudication, personnel claims recovery, tort claims investigation, affirmative claims processing, and claims office management. Attendees will be able to participate in three of these workgroups, based on their interests and needs. Attendance at this workshop will be limited to civilian non-attorney and enlisted claims personnel who have more than four years of claims experience (*i.e.*, the "senior" adjudicator or examiner). The workshop will be presented once a year and will run for two-and-a-half days. It will be conducted in the vicinity of Fort Meade to allow a visit to the Claims Service for a tour and additional one-on-one meetings.

The third tier is the annual USARCS Claims Training Workshop held each summer in Charlottesville (see the Appendix). This workshop will provide training on claims policy and the investigation, adjudication, and settlement of claims under the purview of the Army Claims System. In this regard, the workshop is heavily weighted toward the tort claims area. There will be training related to personnel claims, Article 139 claims, and affirmative claims, however. The emphasis is on the "lawyering of claims" and training is done through lectures, discussion workshops, and elective seminars. The primary attendees for this workshop are Active Army claims judge advocates and claims attorneys, Reserve Component judge advocates in claims detachments or serving as claims officers, civilian claims attorneys in the Corps of Engineers, medical claims investigators, and "senior" civilian and enlisted claims personnel whose primary responsibilities encompass tort claims investigation and/or general claims office supervision. This workshop will run for three-and-a-half days.

As a general rule, no individual should attend more than one of the above workshops in any single year. It may be desirable, however, particularly for small offices, to send one person to both the Advanced Workshop and to the Charlottesville Workshop in a single year. It is also doubtful that an individual needs to attend either the Advanced Workshop or the Charlottesville Workshop every year; heads of claims offices should develop a training plan that looks at the needs of all their personnel, both those in the claims office on a rotational basis and those in a more permanent status, to ensure training for the maximum number of personnel. Attendance at these workshops will be by nomination and the Commander, USARCS reserves the right to approve or disapprove individual nominees and to grant waivers to attendance criteria at the request of heads of claims offices.

The training generally will be provided by USARCS subject-matter experts. Additionally, USARCS will invite selected individuals from Army field claims offices and other federal agencies (*e.g.*, Department of Justice, Veterans' Administration, and the Armed Forces Institute of Pathology) to present training and to act as facilitators at the workshops.

Claims training is addressed in TJAG Policy Letters 86–10 and 87–2, and is an item of interest for Article 6 visits. USARCS looks upon this training as serious business and as a vital part of its mission of assisting field claims offices in performing their claims function. For this to succeed, field claims offices must take a similar approach to claims training. Area claims offices should budget sufficient TDY funds to send at least one person a year to two of the workshops; claims processing offices should budget for at least one person attending one workshop a year. Only in this way can we be sure that claims offices have trained personnel and ensure the proper functioning of the Army Claims System.

Appendix

USARCS Training Program

Basic Claims Workshop Schedule

FIRST DAY

0800—0900 Intro/Personnel Claims (PC) Overview
0900—1200 PC Problems (session 1)
1200—1330 Lunch
1330—1630 PC Problems (session 2)

SECOND DAY

0800—0900 Mobile Home Symposium
0900—1200 PC Problems (session 3)
1200—1330 Lunch
1330—1500 Seminars
- Claims administration and automation
- Tort claims recognition
- Affirmative claims processing
- Vehicle losses
- Local recovery problems

1500—1630 Seminars (repeat)

THIRD DAY

0800—0930 Seminars (repeat)
0930—1030 Q&A/Open discussion
1030—1100 Office management update
1100—1105 Closing remarks

Advanced Claims Workshop Schedule

FIRST DAY

0815—0830 Introduction
0830—0900 Keynote Speaker
0900—1030 New Developments
- PC/AC—Ch, PC&RD
- Torts—Ch, TCD

1030—1100 Budget & CEA issues—Ch, BIMO
1100—1130 Workgroup sign-up/distribute materials
1130—1300 Lunch
1300—1600 Workgroups
- Personnel claims adjudication
- Personnel claims recovery
- Tort claims investigation
- Affirmative claims management
- Claims administration/office management

1600—1630 Sign up for meetings with USARCS personnel

SECOND DAY

0830—1130 Workgroups (repeat)
1130—1300 Lunch
1300—1400 Open forum (discussion)
1400—1700 Workgroups (repeat)

THIRD DAY

0800—0900 Tour of USARCS
0900—1100 One-on-one meetings with USARCS personnel
1100—1300 Commander's Luncheon (optional)

Annual Claims Training Workshop Schedule (TJAGSA)

FIRST DAY

Introduction
Keynote Speaker
Personnel claims, carrier recovery and affirmative claims presentations
Lunch
Personnel and affirmative claims elective seminars (special session on maritime claims/special torts subjects for COE personnel)
Social hour

SECOND DAY

Tort claims presentation
LitDiv presentation
Guest Speaker (claims or litigation, or both)
Lunch
Elective seminars

THIRD DAY

Tort claims mandatory workshops (7 hrs)
(No guest speakers)

FOURTH DAY (morning only)

Claims administration/management presentations
Guest speaker (optional)
Closing remarks

Responsibilities of Heads of Area Claims Offices

When the newest version of Army Regulation (AR) 27–20 went into effect on 10 August 1987, it created the concepts of Area Claims Offices and Claims Processing Offices. The change is more than a mere change in titles. It involves new duties and new responsibilities, especially for the heads of Area Claims Offices. These many and varied new duties and responsibilities are listed in paragraph 1–7*e*, AR 27–20 and are set out below.

In accordance with paragraph 1–7*b*, AR 27–20, the Commander, US Army Claims Service (USARCS) has designated forty-three judge advocate claims offices within CONUS and seventeen judge advocate claims offices OCONUS as Area Claims Offices. These offices are listed in Annex A to the Claims Service Manual, as revised in Change 6, mailed out to all claims offices in August. It is extremely important that staff and command judge advocates who have been designated as heads of Area Claims Offices know and understand their duties. In accordance with AR 27–20, heads of Area Claims Offices will—

a. Ensure that claims in their area of responsibility are promptly investigated according to [AR 27–20].

b. Ensure that each organization or activity (for example, U.S. Army Reserve (USAR) or Army National Guard (ARNG) unit, Reserve Officers' Training Corps (ROTC) detachment, recruiting company or station and DOD agency) within the area appoints a claims officer to investigate claims incidents not requiring investigation by a JA (para 2–4c(2) [AR 27–20]) and ensure that this officer is adequately trained.

c. Act as a claims settlement authority on claims within the monetary jurisdictions set forth in [AR 27–20] and forward claims beyond such jurisdictions to the Commander, USARCS or to the chief of a command claims service, as appropriate, for action.

d. Designate claims processing offices and request the Commander, USARCS or the chief of a command claims service, as appropriate, to grant claims approval authority to a claims processing office with respect to claims within that office's jurisdiction, as specified under paragraph [1–7*b*(4) and *c*(2), AR 27–20].

e. Prepare and publish a claims directive concerning the investigation and processing of claims matters for the guidance of all claims processing offices within their area.

f. Implement claims policies and guidance furnished by TAJAG or Commander, USARCS through policy directives or the Claims Manual and establish and implement necessary claims policies and procedures not contrary to the foregoing.

g. Ensure that there are an adequate number of qualified JAs or claims attorneys, claims examiners, claims ajudicators, and claims clerks in all claims offices within their area to take prompt action on claims and that they are adequately trained. Initiate requests for the designation of claims attorneys in offices within their area.

h. Budget and fund for claims investigations and activities to include per diem and transportation of claims personnel, claimants and witnesses, independent medical examinations, appraisals, independent expert opinions, long distance phone calls, recording and photographic equipment, use of express mail or couriers, and other necessary expenses.

i. Within Continental United Status (CONUS), procure and disseminate adequate legal publications on local law and verdicts relating to tort claims within the area of jurisdiction.

j. Notify the Commander, USARCS of all claims and claims incidents as required by paragraph 2–5 and 2–11*b*(2) [AR 27–20].

k. Develop and maintain written plans for a disaster or civil disturbance. The plan should include a requirement for an advance party to assess the need for the presence of a special claims processing office. (See also para 1–8*c*(4)(c) [AR 27–20].

Normally, all Claims Processing Offices within the Area Claims Office's geographic area will operate under the supervision of the Area Claims Office. Heads of Area Claims Offices may designate new Claims Processing Offices as required. See paragraph 1–7*d*(4), AR 27–20. [Please note that these are in addition to offices already designated as "claims processing offices with approval authority" by the Commander, US Army Claims Service in Annex A of the Claims Service Manual and under the provisions of paragraph 1–9*h*(2), AR 27–20]. A number of offices that process—but do not pay—claims already exist in fact, however, but without formal designation as Claims Processing Offices. Some have existed and have been doing excellent claims work for years. Some of these offices send personnel to claims seminars and to the annual Claims Conference, but hear of these activities only by chance through the claims grapevine. Some receive our publications from the claims office they support; some do not. It is the responsibility of the Area Claims Office to legitimize these offices and ensure that the personnel there are well-trained, are made aware of new claims information, and are competent to perform their claims jobs. Remember, only claims processing offices staffed with a JA or claims attorney may be granted approval authority. A grant of approval authority will not be effective until coordinated with the Commander, USARCS, and a command and office code assigned.

Accordingly, heads of Area Claims Offices should review the claims processing organization within their geographical areas of responsibility and formalize any informal arrangements by establishing or recognizing claims processing offices or drafting area claims directives. Select the most suitable type of office, and, when necessary, ask the Commander, USARCS, for claims approval authority for that office. We need to know about all depots, arsenals, subinstallations, etc., that are performing claims processing functions. The Commander, USARCS asks that heads of Area Claims Offices send him a copy of the document designating new claims processing offices that are not exercising approval authority.

Claims Notes

Personnel Claims Note

Mobile Home Valuation

One of the many problems that mobile homes present to the claims office is placing a value on a destroyed mobile home. USARCS subscribes to the *N.A.D.A. Mobile Home Manufactured Housing Appraisal Guide* which can be used to check values obtained from other sources. To obtain a value for a particular mobile home, contact the Personnel Claims Branch, AV 923–3226/3229 or comm (301) 677–3226/3229.

Tort Claims Notes

Single Point of Contact for State National Guard

Under paragraph 6–6, AR 27–20 (10 July 1987) and the Claims Service Manual, Annex B (Change 6, 12 August 1987), a single area claims office (ACO) will serve as the primary point of contact with the National Guard of a state or territory even though more than one ACO may have investigative responsibility within a particular state.

All ACOs with responsibility for a particular state or, in certain instances more than one state, should inform the state Adjutant General of this responsibility and the need to deal only with the designated ACO on claims matters. This includes forwarding claims and investigations to the designated ACO. The designated ACO is responsible for ensuring that appropriate distribution is made to the appropriate ACO or claims processing office (CPO). Two examples of appropriate disposition follow:

1. An automobile accident occurs in the San Francisco area involving a National Guard (NG) soldier whose home unit is in San Diego. San Francisco is in the ACO jurisdiction of Presidio of San Francisco (PSF). San Diego is in the ACO jurisdiction of Fort Irwin. The California National Guard claims liaison office in Sacramento should forward the investigative report to Fort Ord which is the ACO responsible for the State of California. Fort Ord will, in turn, determine which ACO, Fort Irwin or PSF, is appropriate to process any claim and whether to notify USARCS. In accordance with paragraph 2–11*b*, AR 27–20, if the accident is a major one and immediate investigation by a claims judge advocate is required, Fort Ord should develop notification procedures together with the California National Guard to ensure prompt investigation giving consideration to the provision that PSF continues to have primary investigative responsibility under paragraph 1–7*d*, AR 27–20 for its area of geographic jurisdiction.

2. An accident occurs near Fort Ord involving a Nevada National Guard vehicle enroute to Camp Roberts, California. The Presidio of San Francisco is the single point of contact with the Nevada National Guard and will play the role described for Fort Ord above. Nevertheless, Fort Ord has primary investigative responsibility.

In the past, most problems in obtaining complete investigations have arisen where the NG unit or individual has been traveling to or from a training site located in another state. The designation of a single ACO to serve as primary liaison or point of contact with each Adjutant General is intended to ensure the prompt reporting and investigation of accidents in such cases. Accordingly, the establishment of liaison should be made with the idea that the state National Guard headquarters must develop a system of centralized reporting. This will result in notifying a single ACO responsible for notifying the ACO with primary investigative jurisdiction and achieving earlier and fuller investigations with full cooperation of all concerned down to and including the NG unit.

Sports Injury Claims

Federal Tort Claims Act (FTCA) claims by federal civilian employees for injuries arising from participation in organized athletic programs at on-post Army facilities may be compensable under the Federal Employees' Compensation Act (FECA).[1] Because FECA provides an exclusive remedy,[2] such claims should be investigated to determine whether they arose out of a covered sports activity. An example of a covered activity is a league that is recognized, organized, and administered by the Army and is considered essential to the civilian workforce. When investigation reveals the foregoing, the claimant should be requested to file a FECA claim at the local civilian personnel office and the FTCA claim should be forwarded to USARCS for action; as such a claim must be submitted first under FECA.[3]

Employees of nonappropriated fund activities are subject to similar procedures where covered by the Longshoreman's and Harbor Worker Act.[4]

The FECA bar also extends to a claim for subsequent medical malpractice where the sports injury is treated at an Army medical treatment facility.[5]

An FTCA suit against the United State for indemnity or contribution by a manufacturer of sports equipment is not barred, even though the original suit on which the demand is based was by the injured federal employee.[6]

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[1] 5 U.S.C. §§ 8101–8150 (1982).

[2] 5 U.S.C. § 8116(c) (1982); Johanson v. United States, 343 U.S. 427 (1952).

[3] Gill v. United States, 641 F.2d 195 (5th Cir. 1981); Reep v. United States, 557 F.2d 204 (9th Cir. 1977); Joyce v. United States, 474 F2.d 215 (3rd Cir. 1973); Somma v. United States, 283 F.2d 149 (3rd Cir. 1960).

[4] 33 U.S.C. §§ 901–950 (1982); 5 U.S.C. § 8171 (1982); Forfari v. United States, 268 F.2d 29 (9th Cir.), *cert. denied*, 361 U.S. 902 (1959).

[5] Alexander v. United States, 500 F.2d 1 (8th Cir. 1974); Sanders v. United States, 317 F.2d 142 (5th Cir. 1967); Balancio v. United States, 267 F.2d 135 (2d Cir. 1959).

[6] Lockheed Aircraft Co. v. United States, 460 U.S. 190 (1983). Note, however, that the U.S. may be entitled to the exclusivity provision of state workmen's compensation law. General Electric v. United States, 603 F. Supp. 881 (D. Md. 1985).

Automation Notes

Information Management Office, OTJAG

New Menu Available

And now the latest offer you can't (and maybe don't want to) refuse from your friends at the OTJAG Information Management. The 550 Zenith Z–248's with printers and other accessories have long since been delivered and now we are sending more good things your way. The next shipment will be the Legal Automated Army-Wide System (LAAWS) menu program.

This wonderful program installs a comprehensive menu system on your PCs, as well as LEXIS software, a set of system utilities, Personal Computer Picture Graphics (a freeware graphics program), and the Claims Management System. Further programs to monitor suspenses, manage personnel, and prepare reports are under development and will be shipped to fill out the menu in the coming months.

If you already have a copy of the Legal Assistance Module, and are on our mailing list, your copy of the LAAWS menu should be on its way. If not, please drop us a line and we will get a series of disks and instructions out to you.

Bug Alert

If you are using DisplayWrite 4 word processing software, a bug in the LAAWS Main Menu will prevent you from accessing DW4. Appropriately enough, this little pest resides in Line 13 of 2.bat which is in the \LAAWS001 subdirectory. To squash the bug, using the following procedure:

1. Turn your computer on. The LAAWS Main Menu should be displayed, with the Disk Operating System (DOS) prompt underneath it. The prompt looks like this:

   C:\>

2. At the DOS prompt, type:

   CD\LAAWS001

3. The DOS prompt should change from C:\> to C:\LAAWS001>.

4. At this new prompt, type:

   EDLIN 2.BAT

5. A message and an asterisk prompt will be displayed. It should look like this:

   End of input file
   *

6. At the asterisk prompt, type:

   13

7. Line 13 of 2.bat will be displayed. It should look like this:

   13: if exist dw4a0*.* go to DW4GO
   13:

8. Your cursor will be directly beneath the first letter in the line. Press the right hand arrow key. As the cursor moves across the screen, the characters in the top line are duplicated on the bottom line. Stop when the cursor reaches the end of the word "go".

The screen should look like this:

   13: if exist dw4a0*.* go to DW4GO
   13: if exist dw4a0*.* go

9. Now type:

   to DW4GO

The screen should look like this:

   13: if exist dw4a0*.* go to DW4GO
   13: if exist dw4a0*.* go to DW4GO

10. Press the Return or Enter key. This should return you to the asterisk prompt.

11. At the asterisk, type the letter "e."

12. Press the Return or Enter key. This should return you to the DOS prompt.

13. Type the letter "m."

14. This should return you to the LAAWS Main Menu.

Note: When you are finished using DW4, the Main Menu will not automatically be brought up. You can display the LAAWS Main Menu by typing the letter "m" at the DOS prompt. To automatically return to the LAAWS Main Menu, two lines must be inserted at the end of DW4.bat in the C:\DW4> subdirectory. The two lines are:

   cd\
   m

Do not attempt to do this yourself unless you are the one who edited the DW4.bat file to conform to your system in the first place.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Training the Reserve Component 71Es

The following information was provided by SFC Debrah Fox, OTJAG liaison to the Naval Justice School. A recent survey of Reserve Component (RC) 71Es showed that only approximately 50% of them were MOS qualified. This falls significantly lower than FORSCOM's goal of 85% MOS qualified. Part of the problem is meeting the MOS standards established in AR 611–201. Another part of the problem seems to be a lack of suitable training opportunities. This note is designed to provide some ideas to solve the latter problem.

Army Reserve Component court reporters receive their MOS training at the Naval Justice School during an intensified two-week course of instruction. To successfully graduate from the course, the trainees must be able to dictate at a rate of 160 words per minute. To pass subsequent SQT tests, the court reporters must be able to dictate a minimum of 200 words per minute. The only way to reach that level is to practice at or above the higher rate of speed.

There are various methods for improving your skills. Each unit assigned a 71E should also have a set of court reporting equipment assigned. It is not imperative to sign out the complete set of equipment; just sign for the mask. Take it home and practice in front of the television or radio and follow along with the news.

In addition, when performing AT, do not get trapped in the mindset that only one reporter should be used to transcribe a court-martial or a board. If more than one reporter is available, have the extra reporters sit in the back of the court room and act as backup reporters. This is excellent training, and the backup reporters can be used to help expedite the processing of the records of trial.

There is also a Stenomask Reporting Course that can be obtained for $150.00, payable to NSVRA (National Stenomask Verbatim Reporters Association). The mailing address is: Horace Webb, HM, 1553 Crown Road, Petaluma, California 94952.

Also available for purchase are actual certification and national Speed Championship tests that have been retired from use by NSVRA. These tapes have literary, jury charge, and question and answer tests from 200 to 350 words per minute. The mailing address and price for these tapes are: Marilyn Ashcraft, CVR–CM, Special Testing Committee, P.O. Box 984, Warren, AR 71671. Practice tapes I, II, and III are available for $8.00 each.

RC 71E's can be used to record and transcribe meetings, classes, or depositions. Perhaps mock courts-martial could be conducted and transcribed. The point is that the commanders and SJAs of the RC 71Es should use imagination in designing suitable training programs for their reporters. The court reporters should use imagination also. The reporters should not sit back and wait for their skills to improve. They should take the initiative and sign for their equipment or ask their unit commander to purchase training materials.

The POC for further information on RC 71E training materials is SFC Fox, AV 948–4408 or commercial (401) 841–4408.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 972–6307; commercial phone: (804) 972–6307).

2. Cancellation of ADR Course

The Alternative Dispute Resolution (ADR) Course (5F–F25) scheduled for 16–19 February 1988 has been cancelled. The use of ADR programs in civilian communities is rapidly increasing because such programs permit swift, inexpensive, and fair dispute resolution. Attorneys should be able to advise clients regarding the availability of such programs, their benefits and disadvantages, and their mechanics. Instruction addressing these issues is currently integrated into basic, graduate, and short courses at TJAGSA.

3. TJAGSA CLE Course Schedule

January 11–15: 1988 Government Contract Law Symposium (5F–F11).

January 19–March 25: 115th Basic Course (5–27–C20).

January 25–29: 92nd Senior Officers Legal Orientation Course (5F–F1).

February 1–5: 1st Program Managers' Attorneys Course (5F–F19).

February 8–12: 20th Criminal Trial Advocacy Course (5F–F32).

February 22–March 4: 114th Contract Attorneys Course (5F–F10).

March 7–11: 12th Administrative Law for Military Installations Course (5F–F24).

March 14–18: 38th Law of War Workshop (5F–F42).

March 21–25: 22nd Legal Assistance Course (5F–F23).

March 28–April 1: 93rd Senior Officers Legal Orientation Course (5F–F1).

April 4–8: 3rd Advanced Acquisition Course (5F–F17).

April 12–15: JA Reserve Component Workshop.

April 18–22: Law for Legal Noncommissioned Officers (512–71D/20/30).

April 18–22: 26th Fiscal Law Course (5F–F12).

April 25–29: 4th SJA Spouses' Course.

April 25–29: 18th Staff Judge Advocate Course (5F–F52).

May 2–13: 115th Contract Attorneys Course (5F–F10).

May 16–20: 33rd Federal Labor Relations Course (5F–F22).

May 23–27: 1st Advanced Installation Contracting Course (5F–F18).

May 23–June 10: 31st Military Judge Course (5F–F33).

June 6–10: 94th Senior Officers Legal Orientation Course (5F–F1).

June 13–24: JATT Team Training.

June 13–24: JAOAC (Phase VI).

June 27–July 1: U.S. Army Claims Service Training Seminar.

July 11–15: 39th Law of War Workshop (5F–F42).

July 11–13: Professional Recruiting Training Seminar.

July 12–15: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).

July 18–29: 116th Contract Attorneys Course (5F–F10).

July 18–22: 17th Law Office Management Course (7A–713A).

July 25–September 30: 116th Basic Course (5–27–C20).

August 1–5: 95th Senior Officers Legal Orientation Course (5F–F1).

August 1–May 20, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	on or before 30 July annually
Florida	assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	1 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	31 December in even or odd years depending on admission

For addresses and detailed information, see the July 1987 issue of The Army Lawyer.

5. Civilian Sponsored CLE Courses

March 1988

3–4: PLI, Coordinating the Defense of Product Liability Litigation, New York, NY.

3–4: PLI, Managed Health Care, New York, NY.

3–4: PLI, Title Insurance—Beyond the Boilerplate, New York, NY.

3–5: NELI, Employment Law Litigation, Jupiter Beach, FL.

3–5: ALIABA, Business Reorganizations under the Bankruptcy Code, Tampa, FL.

4: ALIABA, Effective Legal Negotiation and Settlement, Los Angeles, CA.

4–5: PLI, The SEC Speaks in 1988, Washington, DC.

5: ALIABA, Effective Legal Negotiation and Settlement, San Francisco, CA.

6–10: NCDA, Criminal Investigators Course, Orlando, FL.

6–18: NJC, Special Court—For Attorney Judges, Reno, NV.

6–18: NJC, Special Court—For Non-Attorney Judges, Reno, NV.

7–8: PLI, Preparation of the Fiduciary Income Tax Return, New Orleans, LA.

7–8: PLI, Use of Trusts in Estate Planning, San Francisco, CA.

7–8: PLI, Environmental Regulation of Real Estate, New York, NY.

7–9, SLF, Short Course on Employment Discrimination, Dallas, TX.

10–11: NCLE, Estate Planning and Probate, Lincoln, NE.

10–11: PLI, Letters of Credit and Bankers' Acceptance, New York, NY.

10–11: PLI, Current Developments in Bankruptcy and Reorganization, Houston, TX.

10–11: UMLC, Medical Institute for Attorneys, Miami Beach, FL.

10–11: PLI, Cable Television, New York, NY.

10–11: USCLE, Institute for Corporate Counsel, Los Angeles, CA.

10–11: PLI, Partnership Taxation, San Francisco, CA.

10–11: SMU, Texas Family Law and Community, Dallas, TX.

10–11: PLI, Private Placements, San Francisco, CA.

11: MBC, Preparation and Trial of Soft Tissue Injury Case, St. Louis, MO.

11: MBC, Probate Practice, Clayton, MO.

11–12: UKCL, Legal Issues for Bank Counsel, Lexington, KY.

12–13: MLI, Litigating Psychological Injuries, Orlando, FL.

12–19: NELI, Employment Law Briefing, Vail, CO.

13–16: NCJFC, National Conference on Juvenile Justice, Miami, FL.

13–18: NJC, Evidence for Special Court Judges, Reno, NV.

14–15: PLI, Estate and Financial Planning for the Aging Client, New York, NY.

16–18: PLI, Advanced Antitrust Workshop, Naples, FL.

17–18: FBA, Immigration Law Conference, Washington, D.C.

17–18: PLI, Tax Exempt Financing, New York, NY.

17–18: PLI, Franchising—Business Strategies and Legal Compliance, Los Angeles, CA.

17–18: PLI, Real Estate Development and Construction Financing, New York, NY.

17–18: PLI, Funding Federal Political Campaigns, San Francisco, CA.

18: LSU, Labor and Employment Law, Baton Rouge, LA.

18: NKU, Surface Mining, Highland Heights, KY.

19–25: PLI, Patent Bar Review, New York, NY.

20–24: NCDA, Prosecuting Drug Cases, New Orleans, LA.

21–22: PLI, Managed Health Care, San Francisco, CA.

21–24: FBA, Mutual Funds and Investment Management Conference, Tucson, AZ.

21–27: NITA, Midwest Regional Trial Advocacy Program, Chicago, IL.

23–25: ALIABA, Pension, Profit-Sharing and Other Deferred Compensation, San Francisco, CA.

24–25: LSU, Mineral Law Institute, Baton Rouge, LA.

24–25: PLI, Title Insurance—Beyond the Boilerplate, Chicago, IL.

24–26: PLI, Workshop on Direct and Cross-Examination, Chicago, IL.

25: UKCL, Federal Practice Institute, Lexington, KY.

25–27: MLI, Orthopedic Injury and Disability, Lake Tahoe, NV.

28–29: PLI, Current Developments in Bankruptcy and Reorganization, Chicago, IL.

28–29: PLI, Use of Trusts in Estate Planning, New York, NY.

28–4/1: GCP, Construction Contracting, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1987 issue of *The Army Lawyer.*

6. Army Sponsored Continuing Legal Education Calendar (1 January 1988–30 September 1988)

The following is a schedule of Army-sponsored continuing legal education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697–3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972–6380; Trial Judiciary, (703) 756–1795; Trial Counsel Assistance Program (TCAP), (202) 756–1804; U.S. Army Trial Defense Service (TDS), (202) 756–1390; U.S. Army Claims Service, (301) 677–7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Butler, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972–6342.

Training	*Location*	*Date*
USAREUR Legal Assistance/Tax Seminar	Landstuhl, Germany	11–15 January 1988
USAREUR Administrative Law Seminar	Bad Herrenalb, Germany	19–22 January 1988
TCAP Seminar	West Point, NY	11–12 January 1988
TJAGSA Onsite	Los Angeles, CA	16–17 January 1988
TJAGSA Onsite	Seattle, WA	23–24 January 1988
TDS Workshop (Region VII)	Germany	February 1988
TDS Workshop (Region VIII)	Germany	February 1988
3d/4th Jusicial Circuit Conference	Denver, CO	February 1988
TCAP Seminar	Fort Bragg, N.C.	25–26 February 1988
TJAGSA Onsite	San Antonio, TX	5–6 March 1988
TJAGSA Onsite	Columbia, S.C.	5–6 March 1988
TJAGSA Onsite	Nashville, TN	12–13 March 1988
TJAGSA Onsite	Kansas City, MO	12–13 March 1988
TJAGSA Onsite	San Francisco, CA	19–20 March 1988
TJAGSA Onsite	Washington, D.C.	26–27 March 1988
TDS Workshop (Region IX)	Germany	March 1988
TCAP Seminar	Colorado Springs, CO	15–16 March 1988
USAREUR Contract Law Seminar	TBA	14–18 March 1988
Western Regional Claims Workshop	San Antonio, TX	5–7 April 1988
TJAGSA Onsite	Miami, FL	9–10 April 1988
TJAGSA Onsite	San Juan, PR	16–17 April 1988
TJAGSA Onsite	Oxford, MS	16–17 April 1988
TJAGSA Onsite	New Orleans, LA	16–17 April 1988
TJAGSA Onsite	Chicago, IL	23–24 April 1988

TDS Workshop (Region I)	Fort Knox, KY	April 1988
TDS Workshop (Region III)	Fort Leavenworth, KS	27–29 April 1988
TCAP Seminar	San Diego, CA	April 1988
USAREUR Judge Advocate Update	Heidelberg, Germany	21–22 April 1988
USAREUR Legal Administrator's Workshop	Berlin, Germany	28–29 April 1988
TDS Workshop (Region VI)	Korea	April 1988
TDS Workshop (Region II)	Fort Stewart, GA	18–20 May 1988
TDS Workshop (Region V)	Fort Lewis, WA	24–26 May 1988
TJAGSA Onsite	Columbus, OH	14–15 May 1988
TJAGSA Onsite	Park City, UT	14–15 May 1988
TCAP Seminar	Germany	May 1988
USAREUR German/American Law Symposium	Heidelberg, Germany	May 1988
USAREUR Operational Law Workshop	Heidelberg, Germany	May 1988
Eastern Regional Claims Workshop	TBA	10–12 May 1988
USAREUR Trial Observer's Workshop	TBA	May 1988
TDS Workshop (Region IV)	Austin, TX	June 1988
TCAP Seminar	Fort Hood, TX	June 1988
TCAP Seminar	Fort Monroe, VA	July 1988
TDS Seminar	Fort Monroe, VA	July 1988
TDS Workshop (Region IX)	Europe	August 1988
TCAP Seminar	Atlanta, GA	August 1988
TDS Workshop (Region VI)	Yongsan, Korea	September 1988
TCAP Seminar	Kansas City, MO	September 1988

Current Material of Interest

1. Ratification of the Constitution

The Commission on the Bicentennial of the United States Constitution has announced that the area of emphasis for 1988 is the "Ratification Process." This facet of constitutional history is colorful and exciting. It presents the perfect opportunity for military attorneys, especially attorneys in the National Guard or the Army Reserve who practice in one of the thirteen original states, to contribute to the Department of the Army goal of educating our soldiers and their family members. Interested attorneys are invited to submit vignettes or short articles dealing with the history of how their state handled ratification to the Editor, *The Army Lawyer,* TJAGSA, Charlottesville VA 22903–1781. Submissions will be considered for publication in a future issue. Where appropriate, the article should discuss issues of interest to the military audience.

2. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs). (Note corrected number).

AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234 Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211 Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509 All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236 Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233 Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252 All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD A174549 All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771 All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235 All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054 All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857 Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).
AD B110134 Preventive Law Series/JAGS–ADA–87–4 (196 pgs).

Claims

AD B108054 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes and Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 210–174	Accounting Procedures for Prisoners' Personal Property and Funds		16 Oct 87
AR 351–1	Individual Military Education and Training		15 Oct 87
AR 380–66	International Technology		23 Oct 87
AR 420–16	Facilities Engineering Reports		30 Sep 87
AR 420–43	Electrical Services		27 Nov 87
AR 600–85	Alcohol and Drug Abuse Prevention and Control Program	101	1 Sep 87
AR 611–1	Military Occupational Classification Structure Development and Implementation		5 Oct 87
AR 611–201	Enlisted Career Management Fields and Military Occupational Specialists		31 Oct 87
AR 725–50	Requisitioning, Receipt and Issue System		1 Oct 87
Cir 11–87–3	Internal Control Review Checklists		25 Sep 87
Cir 623–87–1	Noncommissioned Officer Evaluation Reporting System		1 Oct 87
DA Pam 25–30	Index of Army Pubs and Blank Forms		30 Sep 87
DA Pam 350–100	Extension Training Materials Consolidated MOS Catalog		24 Sep 87
DA Pam 600–63–2	Fit to Win Commanders Guide		Sep 87
DA Pam 600–63–6	Fit to Win Nutrition and Weight Control		Sep 87

DA Pam 600–63–7	Fit to Win Antitobacco Use		Sep 87
DA Pam 600–63–10	Fit to Win Stress Management		Sep 87
DA Pam 638–1	Guide for Escorts of Deceased Army Personnel		15 Sep 87
DA Pam 690–41	Standardized Position Descriptions		1 Sep 87
JFTR	Joint Federal Travel Regulations	11	1 Nov 87
JFTR	Joint Federal Travel Regulations Vol. 2	265	1 Nov 87
UPDATE 11	Officer Ranks Personnel		1 Oct 87
UPDATE 12	All Ranks Personnel		7 Oct 87

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About,* 75 Ky. L.J. 841 (1986–87).

Brown, *What Lawyers Must Know About Asbestos,* A.B.A. J., Nov. 1987, at 74.

Friedlander, *Socrates Was Right: Propositions in Support of Capital Punishment,* 13 New Eng. J. Crim. & Civ. Confinement 1 (1987).

Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 31 Trial Law. Guide 1 (1987).

Guide to International Legal Research, 20 Geo. Wash. J. Int'l L. & Econ. 1 (1986).

Humble, *Evidentiary Admissions of Defense Counsel in Federal Criminal Cases,* 24 Am. Crim. L. Rev. 93 (1986).

Kaplan, *Defending Guilty People,* 7 U. Bridgeport L. Rev. 223 (1986).

Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes,* 18 Tex. Tech. L. Rev. 1157 (1987).

Mandatory Drug Testing of Employees, W. St. U.L. Rev. 601 (1987).

Massler, *How To Get and Use IRS Private Letter Rulings,* Prac. Law., Oct. 1987, at 11.

Mooney, *Deciding Not to Resuscitate Hospital Patients: Medical and Legal Perspectives,* 1986 U. Ill. L. Rev. 1025.

Raitt, *Personal Knowledge Under the Federal Rules of Evidence: A Three-Legged Stool,* 18 Rutgers L.J. 591 (1987).

Rice, *Military Lawyers: The Overlooked Law Firm Asset,* Va. B.J., Fall 1987, at 13.

Special Issue on Evidence in Matrimonial Cases, 21 Fam. L.Q. 145 (1987).

Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights,* 38 Hastings L.J. 889 (1987).

Zwicker, *How to Use and Manage Information,* 28 Law. Off. Econ. & Mgmt. 141 (1987).

Commentary, *Criminal Procedure: Closed-Circuit Testimony of Child Victims,* 40 Okla. L. Rev. 69 (1987).

Note, *Assuring Federal Facility Compliance With the RCRA and Other Environmental Statutes: An Administrative Proposal,* 28 Wm. & Mary L. Rev. 513 (1987).

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